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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 895

ABRAHAM CHAIKEZ, *Petitioner*

AGAINST

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ABRAHAM CHAIFETZ, *Petitioner*

AGAINST

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Abraham Chaifetz, an attorney at law in the District of Columbia, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 10, 1960, affirming a judgment of conviction on two counts of a five count indictment charging income tax evasion, wherein he was found guilty by a jury of violating *26 U.S.C. Sect. 145* (b) (*1939* I.R.C.) for 1953 (Count 3), and of a purported "lesser offense" in violation of *26 U.S.C. Sect. 7203* (1954 I.R.C.) for 1954 (Count 4). Petitioner was acquitted of tax exasion charges for 1951, 1952, 1954 and 1955.

Petitioner was sentenced to a prison term of 4 to 12 months and to pay a fine of $10,000 on Count 3, and to a

prison term of 4 months and to pay a fine of $10,000 on Count 4, with the latter fine suspended, and the prison term on Count 4 to run concurrently with Count 3.

Petitioner is presently enlarged on bail in the sum of $1,000.00.

THE OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and appears at R.890-896. The opinion of Youngdahl, J., the trial judge, denying petitioner's motions for a judgment of acquittal, or, in the alternative, for a new trial, is reported at *181 F.Supp.57* and reproduced at R.820-825. On May 5, 1959, Tamm, J. District Judge, wrote a memorandum opinion denying petitioner's motions for a Bill of Particulars and to Suppress certain evidence and records obtained through fraud and misrepresentation by revenue agents in the case. The opinion is not reported but is reproduced in R.55-60.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 10, 1960; a timely petition for rehearing en banc (R.898-911) was duly filed within the fifteen day period allowed under the Rules of that court and was denied on December 7, 1960. (R.912)

On December 29, 1960 this Court granted an extension of time within which to file this petition for a writ to February 5, 1961.

The jurisdiction of the Supreme Court is invoked under *28 U.S.C. sec. 1254 (1)* and *Rule 37 (c)* of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Your petitioner Abraham Chaifetz, a member in good standing of the District of Columbia bar, was indicted by a grand jury in Baltimore on January 7, 1958 accusing him

of attempting to defeat and evade the payment of income taxes by filing false and fraudulent returns for the years 1951 through 1955 under *Secs. 145 (b)* of the 1939 Internal Revenue Code and 7201 of the 1954 I.R. Code.

Defendant's motion to transfer the case to Washington, D.C., where he resides, was granted under authority of *18 U.S.C.A. 3237* (b) 1958 Supp. after a blanket plea of not guilty was entered.

In seeking an explanation for the accusations and more detailed information concerning the charges, Chaifetz was furnished an illegible, handwritten photocopy of what he was told was the net-worth chart the prosecution intended to use at his trial.

A motion for a better bill of particulars seeking a clarification of the charges including some forty specific items of alleged unreported income for the five year period and a prayer that the court suppress the evidence and records obtained from the defendant because of the use, by the Revenue agents, of fraud, misrepresentation and deception, was denied on May 7, 1959 by Tamm, J. who noted that such broad relief was not necessary since the government advised and promised the court the case was of the "net-worth" type and would be prosecuted as such. R. 61.

At the request of the trial court, one day prior to the opening of the case, defendant's counsel and the prosecution met in the chambers of the trial judge and entered into certain stipulations pertaining to a number of undisputed assets belonging to and claimed by the defendant.

Despite this agreement, when the trial started, the prosecutor paraded eighty-seven subpoenaed witnesses before the unselected jury, although forty-four of these witnesses were mere custodians of records already stipulated to by both sides, and sought to excuse his conduct by stating that "he hadn't had enough time to cancel out the unnecessary subpoenas in order to avoid the confusion" that surrounded the opening day.

None of the forty-four were ever called upon to testify.

From that jury panel, over the denial of defendant's motion to strike all federal government employees, and from a panel denuded of every person who was either Jewish or had a Jewish sounding name, as a result of the prosecution's use of its peremptory challenges, a jury dominated by ten federal employees was selected.

Once the trial was under way, the government without any notice to defendant, introduced a *new* worth chart with several changes made thereon. The defendant's objection to the introduction of this evidence, which was different from the chart furnished him at the time of the indictment, and now seen for the first time was over-ruled, and taking full advantage of this arbitrary ruling, the prosecution amended this second chart several times during the trial, tacitly admitting that some errors had to be corrected.[1]

For the entire six week period that the trial lasted, the prosecutor daily wheeled in the "evidence" he intended to use against the defendant, using a supermarket type of grocery cart, piled high with papers and records that for the most part were never used.*

Against this unfair and unwholesome environment the defendant was made to stand trial.

The prosecution relied in the main, on the testimony and assumptions of Revenue agent John Hein and Special agent McIntyre who were permitted to relate their activities and

[1] Compare Def. Exh # 41, the illegible, handwritten reduced in size copy of net worth chart furnished him, and Gov. Exh. # 66, the typed chart introduced at the trial and changed during the trial. (R. 845-847; 881-884)

* When Hein was on the stand and unable to answer a question which would have been favorable to the defendant or sought to avoid the situation by claiming sudden loss of memory he attempted to change the tenor of the questioning by referring to the basket of evidence, . . ."

findings from the time Hein was assigned to the case to conduct a 'routine audit' for the year 1951 until the indictment was filed. It became apparent that either Hein or McIntyre, or both were committing perjury after each had been caught making conflicting statements concerning their findings and methods used to entrap and ensnare the defendant.

This did not deter the government very long because when it became clear that the "net-worth" case had been destroyed by the testimony and evidence of the defendant and even some of the government's own witnesses, the prosecutor over defendant's objections, attempted to prove Chaifetz guilty of the felony charged for each year by the 'specific-item' method,—a method he had been precluded from using by the court and by his own choice.**

At the close of the prosecution's case, the defendant made a motion for a directed verdict of acquittal because the government had failed to prove its case as required under the *Holland* v. *U.S. Rule*. The motion was denied.

Defendant was therefore forced to put on his proof to show that the government failed in its investigation to determine his true net-worth and proved that the agents had been completely deficient under the duties required of them in order to sustain a net-worth conviction. Defendant proved the agent's refusal to follow up the "leads" furnished them by Chaifetz, and, that they had omitted from the net worth charts many assets which explained the alleged increase in the net worth computations as *assumed* by the

** In the Government's opening statement, the prosecutor denominated the case as a "net-worth" case and promised to prosecute it as such, R. 67. At a bench conference, prosecutor was reminded by the court how and under what manner the case was to be prosecuted. When Tamm, J. denied the defendant's motion for a better bill of particulars and for other relief, he noted the denial stemmed from the fact that the government advised the court that under the networth theory, the request of the defendant was unnecessary and immaterial to the issues tried in a net-worth case.

prosecution. Then having thoroughly discredited the veracity of the agents through corroborated and undisputed testimony and evidence, the defendant renewed his motion for a directed verdict of acquittal on the same grounds as argued at the end of the government's case. This motion was also denied.

Several prayers offered as instructions to the jury by the defense were refused. The trial court gave a charge which was disjointed, filled with innuendos how the defendant could be found guilty but almost void as to what the jury should look for in order to find the defendant innocent. Several errors in the interpretation of the Internal Revenue laws were pronounced, regarding gift taxes, and what constituted income, etc., and other basic principles connected with a fair charge were missing. This dissertation took two-and-one-half hours after which the jury was locked up overnight.

During the deliberation period, the jury requested three items for examination which the court complied with. However, a fourth matter, that of the jury seeking to examine a certain letter sent by the Philadelphia office of the Internal Revenue to the Washington office seeking information concerning defendant's disclosure of assets claimed to have been omitted by the agents during their investigation, was acted upon in a manner which calls for a reversal of the conviction.

Although the document in question had been marked by the Court as "Def. Exh. 60 for identification," when the jury requested it, the trial court returned the request with the following instruction, "* * * *jury was informed that no such exhibit existed.*" To compound the error, the court failed to notify defendant of such request, and it was sent in without his knowledge or consent, in his absence.

The jury recorded its verdicts for all of the five counts on special forms furnished by the court. (R 806) The defendant was acquitted for 1951, 1952, and 1955. He was found

guilty as charged (guilty of the felony) for 1953, and on count four (1954), the written and oral verdict indicated that the defendant was "guilty of failing to supply information required by law." This was, the court presumed, a verdict of guilty of the "lesser-included offense" for 1954, but as your petitioner will point out in his argument, the verdict was a nullity since it found him guilty of an act which is not a crime, since an essential ingredient of the lesser-included offense was missing, namely, "willfulness!"

At the time the court entertained the defendant's motion for acquittal n.o.v. or in the alternative a motion for a new trial, former defense counsel reported to the court at the express direction of the defendant, that the deputy marshal attached to the trial court had committed acts of misconduct and entered into improper conversations with members of the jury during the trial, a fact reported in the first instance by an alternate juror to former defense counsel immediately after the trial. Defendant was unaware that upon being pressed by the court as to what he wanted to do about this matter, former defense counsel pleaded, among other things, that the report was not in final form and besides he had not come to a financial arrangement with the defendant concerning any appeal or further prosecution. (See record 812.) Defendant learned about this when he received the transcript of the proceedings some three months later. (The reporter in this instance had resigned after the trial, gone to Texas, and when contacted for a copy of the proceedings, demanded his fee in advance and on about March 16, 1960, the reporter filed a copy of the proceedings. (R 811-819).

On February 19, 1960, Chaifetz was sentenced to serve a jail term of four to 12 months and fined ten thousand dollars on count three (1953) and given a sentence of four months and fined ten thousand dollars on count four with the fine suspended and the jail sentence to be served concurrently with the sentence pronounced under count 3. From this sentence and conviction your petitioner appealed

to the Court of Appeals for the District of Columbia, and in a seven page opinion, the Appeals Court ignored the several errors complained of and concentrated on the lesser-included offense issue raised by the defendant and affirmed the judgment of the trial court. The defendant's petition for a rehearing en banc was denied on December 7, 1960 and from that denial and the judgment your petitioner seeks relief, based on errors *of such severity* that this Court ought to correct and reverse in the interest of true justice.

During the trial, defendant was limited to four character witnesses and was restricted from offering a reasonable number who were ready, willing and able to testify to his good character. In this type of case such testimony bears a tremendous amount of weight since the Government's case was based on circumstantial evidence.

Medical testimony was introduced showing that the defendant suffered from an aggravated uncontrolled diabetic condition, high blood pressure, migraine headaches, lapses of memory, comas, and a personal mental situation brought about by a divorce and culminating in his father's death on December 30, 1953. The explanations and proof offered by the defendant remained uncontradicted throughout the trial and nowhere was the prosecution able to prove that the defendant had willfully intended to evade taxes by filing the alleged false and fraudulent returns. Still, on the record, and until it is corrected, he stands convicted.

Petitioner seeks vindication and his freedom from charges resulting in a flagrant miscarriage of justice that only this Court can correct.

Petitioner seeks the correction of errors committed by the United States District Court for the District of Columbia in the first income tax evasion case ever prosecuted in Washington, D.C. by an Assistant U.S. Attorney trying his first income tax evasion case and presided over by a federal District Court judge sitting on his first case of this

type. The "expert" witness used by the government in its attempt to prove the defendant guilty was an unqualified revenue agent who admitted that this was the first income tax evasion case in which he had ever testified.

This case is of national importance involving prosecutions under the Internal Revenue Code, and flagrant violations against the defendant's Constitutional rights under the Fourth, Fifth and Sixth Amendments to our Constitution.

The case involves denial of a defendant's right to be informed of the nature of the charges against him; the right to be tried by a fair and impartial jury; and rights denied him under the "due process" clause. It involves too the abuse of the "net-worth" method of prosecution in a tax evasion case contra to the rule laid down by this Court in *Holland* v. *U.S.*, 348 U.S. 121, 75 S. Ct. 127, and the switching by the prosecution from the "net-worth" method to the "specific-item" method, although defendant had been denied the information concerning the specific items on his motion for a better bill of particulars because of the prosecutor's statement to the courts below that the instant case would be prosecuted solely on the net worth theory.

The case concerns itself further with the Trial Court's refusal to follow the rule laid down in the Holland case, supra, as to when the case is to be taken from the jury. The prosecution failed to follow principles necessary to conviction in a "net-worth" case, such as tracking down "leads" furnished by defendant, properly including all assets, and not wilfully omitting assets.

The case involves the failure of the Trial Court to take cognizance of the misconduct and improper conversations had with members of the jury by his deputy marshal after such facts had been reported by former defense counsel after the trial.

The case presents the question whether, in a long and complex case, based on circumstantial evidence, the Trial

court can arbitrarily restrict the number of character witnesses, and then have the trial court refuse to explain such restriction to the jury; and concerns itself with the improper instructions given by the court concerning certain provisions of the tax laws, improper instructions as to how the defendant could be found guilty but failing to properly balance the charge with how the defendant could be found innocent; the refusal to instruct the jury on the "lesser included" offense in violation of Rule 31 (c) of the F.R. of Cr. P. and the violation of Rule 43 FRCP, by the improper secret instruction to the jury in the absence of defendant, which was incorrect and untrue and without the knowledge, consent or waiver of the defendant, all errors then capped off by the sentencing of the defendant to a prison term for a "crime" that does not exist and for which no punishment is provided anywhere.

For all of the above certiorari is sought.

QUESTIONS PRESENTED

Against the background of the summary statement your petitioner states that the following questions are presented:

1. Did the Trial Court commit prejudicial and reversible error in permitting a "net-worth" income tax prosecution to go to the jury

(A) where the Trial Court never instructed the jury to acquit the defendant if the government failed to prove a net worth case?

(B) where the government failed to establish a 'firm' opening net-worth for the base year through deliberate, erroneous and improper omission of substantial non-taxable assets sufficient to account for and explain the alleged increases in the subsequent net worth computations for the years involved?

(C) where the government failed to produce any witness who could testify to the correct definition of a "load"

as applied to net worth tax investigations, and where the government's own witnesses, testifying as the Revenue agents and "experts" assigned to the instant case, admitted that they failed to run down and or ignored the "leads" furnished them by the taxpayer relative to his additional assets as required under the *Holland* v. *U.S.* rule?[1]

(D) where the government failed to prove the defendant guilty beyond a reasonable doubt at the end of the prosecution's case and again at the end of appellant's presentation of his defense as required under the *Holland* case rule?

(E) where the government failed to prove that any additional tax was due from taxpayer and offered instead net worth charts erroneously prepared, from incomplete and improperly made investigations, by its "expert" witnesses who admitted that the calculations were based on *assumed* net worth increases, after defendant had proved the charts to be incorrect and incomplete on account of the deliberate, unwarranted and erroneous exclusion of defendant's known assets?

(F) where the government was unable to overcome taxpayer's proof that his net worth was *greater* at the starting or opening (base year) point than the government claimed either at the starting point or at the end of the third (middle) year of the prosecution period?

(G) where the government, having failed to prove the defendant guilty under the "net worth" theory, was allowed then to proceed, over defendant's objection, to demand conviction and offer testimony tending to prove defendant guilty via "specific items," which had been admitted only to show wilfullness, when in fact the "specific items" were proven in the main, not to be concealed or hidden but unreported through negligence, oversight, mistake and other

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[1] *Holland* v. *U.S.* 348 U.S. 121, 75 S. Ct. 127

legally acceptable mitigating circumstances and at other times reported in the wrong year?[2]

2. Whether a conviction for the middle year in a five year income tax evasion case based on and prosecuted under the "net worth" theory can stand where defendant has been acquitted for all of the other years and when no unwarranted increase in the net-worth for the third year was proven by the prosecution? (See also query (F) of the first question presented.)

3. Did the Trial Court commit prejudicial and reversible error by allowing the incorrect and incomplete net worth charts containing several discrepancies and omissions to be taken into the jury room knowing that the charts, instead of being a *summary* of the evidence, were in fact but lists of opinions and assumptions prepared by and decided upon by the prosecution's discredited "expert" witnesses?

4. Whether the defendant was denied a fair trial and afforded due process

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[2] Interest or dividend payments credited to taxpayer's account on December 31st was not reported in that year, but reported by the taxpayer in the following year when he actually received the notice and check. The prosecution claimed this was an act showing willful intent.

"* * * In a prosecution for income tax evasion where the government relied on the "net worth" method, the ultimate burden was on the government. * * * If the government chooses to ignore a genuine lead, the trier cannot find that no sufficient funds came from that source. If the government follows up that lead and is unable to establish that a sufficient amount did or did not come from that source, it must at least show that it was not within the range of reasonable probability that sufficient funds came from that source to account for the apparent understatement of income. * * * Review of the evidence fails to support that finding as sufficiently well founded. The findings are based on estimates without sufficient basis in proof to establish guilt beyond a reasonable doubt." *U.S.* v *Ruth*, 13 F Supp 283

(A) when the Trial Court restricted defendant to four character witnesses and refused to properly instruct the jury as requested that the reason for only four witnesses appearing to testify as to defendant's character was because of the court's own restriction and not because of defendant's inability to offer many more prominent and noteworthy ones among which were many members of the Bar and the Hon. F. Dickinson Letts, United States District Judge, all of whom were ready, willing and able to testify in behalf of defendant,—thus depriving defendant of the opportunity to create a reasonable doubt as to his guilt in a case based on circumstantial evidence and where the weight of character testimony is significantly important.

(B) by the Trial Court's refusal to grant, prior to the start of the trial, the defendant's motion to strike all Federal Government employes from the jury panel because of patent bias and prejudice which could be magnified in this type of a case since the 'triers of the facts' were employees of the prosecution and had a direct interest in the outcome of the case.[4]

(C) by the Trial Court's refusal to properly instruct the jury on the "lesser-included offense" as required under *Rule 31 (c), F. R. of Cr. P.*, for *all* of the five years noted in the indictment and restricting such instruction (for the

[4] The fact that Congress provided that Government employees are now qualified to sit on a criminal jury (*D.C. Code, 1951 ed.* as amended, *Title 11, sec. 1420*)—does not mean that they *must* sit, but that they are not now disqualified to serve as jurors in a criminal trial,—provided the accused is not thereby deprived of an impartial jury.

> "• • • federal employees could sit as jurors in a criminal trial,—except, if at all, only in the rarest and most extraordinary combination of circumstances." *Frazier* v. *U.S.*, 335 U.S. 497 @ 511, 512, 69 S. Ct. 20.

Your petitioner contends that the instant case reveals that it falls into the category of the 'rarest and most extraordinary combination of circumstances.'

"lesser-included offense") to the years 1954 and 1955 maintaining that to give such instruction for the earlier years (1951, 1952 and 1953) was improper because those years were barred by the statute of limitations.

(D) by the Trial Court's erroneous conception and construction of the charges involved thus prejudicing defendant's right to acquittal when it (the Trial Court) failed to recognize the difference between the court's power to punish for a violation of the law and the right of a jury to find the defendant guilty or not guilty of the *actual* violation committed (if any), as shown by the evidence and proof.

(E) by the Trial Court's refusal to give *any* instruction for the years 1951, 1952 and 1953, to the extent that if the jury found that the defendant had committed only the "lesser-included" offense—(*sec. 145 (a)- 1939 Internal Rev. Code, Title 26, U.S.C.A.*), which was barred by the statute of limitations,—it had to acquit the defendant for those years.

(F) by the Trial Court's erroneous and prejudicial use of different forms for returning the verdict for the first three years, which included 1953, and restricting the verdicts to that of only guilty or not guilty of the *felony* charged in the indictment, thus implying that the "lesser-included" offense was in no way involved for the first three years.

(G) by the Trial Court's incorrect and improper instructions given with respect to the "gift tax" law provisions of the Internal Revenue Code. (*sec. 1000, Title 26*, 1939 I.R.C., 26 U.S.C.A.) thereby allowing a question of law to be decided by the jury instead of by the court (as to whether or not a gift tax return should have been filed by the defendant for 1953)—instead of instructing and advising the jury that the critical issue was, not whether the defendant should have filed a gift tax return for the year involved, but whether he had in fact received certain monies from his father in 1953 prior to his (the father's death); thus lead-

ing the jury to believe and decide that (a)--if no gift tax return was filed then the defendant did not receive the money, or (2) if he did receive the money, he was guilty of willful evasion by not reporting that income.

(H) where the Trial Court instructed the jury that, even though there was no unwarranted increase for any year, the jury still could find the defendant guilty merely by finding that he had omitted certain specific items of income and therefore had filed a false and fraudulent return.

(I) where the Trial Court in direct violation of *Rule 43* of the *F. R. of Cr. P.*,[5] and in the absence of and without the knowledge of the defendant, sent in a secret, erroneous and untrue instruction to the jury during its deliberation advising that an important document, favorable to the defendant 'did not exist'--when in fact it was very much in existence, had been marked in the clerk's records as Defendant's Exhibit #60 for identification and was the subject of discussion between the court and counsel for both sides and exhibited to a government witness who was questioned about same during the trial.

(J) by the Trial Court's failure and refusal to investigate the charge of misconduct and improper communications with the jury lodged against the deputy marshal attached to the Trial Judge's court by former defense counsel at the specific request of the defendant after such improper and prejudicial acts were reported to defense counsel immediately after the trial.

(K) by the Trial Court's admission, over defendant's objection, of opinion evidence and incomplete tax data pertaining to defendant's prior tax years not covered by the indictment, permitting the implication to be passed on to the jury that the defendant was guilty of tax evasion for

[5] *Rule 43, F.R. Cr. P.*—PRESENCE OF DEFENDANT. The defendant shall be present • • • at every stage of the trial • • •.

prior years as well, for the sole purpose of inflaming the jurors against the defendant.

(L) where the prosecution was permitted to indulge in unwarranted and unfair tactics during the trial among which was (a) the 'parading' of eighty-seven prospective witnesses before the jury panel although more than half (44 to be exact), did not testify and were mere custodians of records whose testimony had been stipulated to prior to trial;—(b) 'parading' the "evidence" against the defendant by rolling that "evidence" into the courtroom in a supermarket type of grocery cart piled high with papers, the greatest amount never being used, and repeating this ritual for the entire six weeks period that the trial lasted; and (c) testifying from the floor without being sworn as to facts not within his own knowledge by examining government witnesses, one in particular, the defendant's brother, so as to create a racial and anti-semitic atmosphere by asking,—"isn't it a fact or isn't it true that you and your mother spoke in YIDDISH the day the revenue agents came to see you about your brother?"—when such tactics did nothing but add fuel to the fire of prejudice being built up against the defendant.[6]

(M) by the Trial Court's failure to suppress and deny the admission of evidence against the defendant which had been secured through fraud, misrepresentation and deceit,

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[6] Not a single person of the Jewish faith or one having a name that sounded Jewish was left to be chosen from the jury panel because the prosecution through its exercise of peremptory challenges had them stricken.

The Trial Court admonished the prosecutor for this patent prejudicial incident; denied defendant's motion for a mistrial; and enlarged the issue that had been silent throughout the entire trial by an unnecessarily extended instruction to the jury on the point that the defendant's religion was immaterial to the issue. But the prosecution thought it important enough to make sure that not a single person of the defendant's faith would be in the jury box when the trial started.

especially after the agents assigned to the case had given conflicting testimony which in turn was proven to be incorrect, incomplete and in many instances untrue.

5. Whether a conviction of a purported "lesser-included offense "and the sentence thereon,—conceded" to be erroneous by the government—should be allowed to stand, where the verdict of the jury, in its written form and as orally pronounced by each juror upon being polled, established beyond any and every doubt that the defendant did not commit *any* crime or violate *any* law under the Internal Revenue Code.

SPECIFICATIONS OF ERRORS TO BE URGED

The Trial Court erred:

1. In denying the motion to suppress evidence obtained by fraud and misrepresentation.
2. In denying the motion for a Bill of Particulars where defendant sought clarification of the charges brought against him.
3. In denying inspection of documents.
4. In denying defendant's motion to strike all government employees from the jury panel.
5. In denying defendant's motion for judgment of acquittal at the close of the Government's case.
6. In denying defendant's motion for judgment of acquittal at the close of defendant's case.
7. In denying defendant's motion for judgment of acquittal n.o.v., or in the alternative for a new trial.
8. In permitting the prosecution to amend the evidence (the net worth chart)—furnished the defendant, after indictment.
9. In permitting the prosecution to amend an amended net worth chart after the trial had begun.

10. In permitting erroneous net worth charts to be taken into the jury room.

11. In giving the jury a secret and erroneous instruction in the absence of the defendant.

12. In giving incorrect and erroneous instructions to the jury on crucial issues. (gift taxes, lesser included offenses, etc.)

13. In failing to instruct on vital and fundamental issues in the case.

14. In failing to instruct the jury in an unbiased and fair manner.

15. In ignoring the misconduct of the marshal attached to his Court and failing to investigate the charges lodged against the marshal.

16. In refusing to grant a mistrial after the prosecutor committed prejudicial error by injecting a religious issue into the trial.

17. In permitting the prosecutor to commit unwarranted, prejudicial acts and allowing improper remarks to go unpunished or stricken in the examination and cross examination of witnesses.

18. In arbitrarily restricting the number of character witnesses and refusing to properly explain the reason to the jury.

19. In punishing the defendant by sentencing him to a prison term and a fine for a violation of law that does not exist. (count 4)

REASONS FOR GRANTING THE WRIT

The Court below has rendered a decision in conflict with other Circuit Courts of Appeals.[1]

The Court below has decided important questions of law contrary to earlier *and later* decisions of that court and has decided important questions of Federal law in conflict with applicable decisions of the Supreme Court.[2]

The Court below has permitted and sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for the exercise of this Court's power of supervision.

The decision of the District Court and the affirmance by the Court of Appeals for the District of Columbia Circuit is in conflict with the Federal Rules of Criminal Procedure, 31 (c), 43 and 52 (b) and decides two questions of general importance and substance relating to the construction and application of the Federal Constitution and statutes in a manner that is contrary to the applicable decisions and mandates of the Supreme Court.[3]

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[1] In trying and reviewing tax evasion cases prosecuted under the "net worth" method. Cf. *U.S.* v. *Chaifetz*, 181 F. Supp. 57, with *Holland* v. *U.S.*, 348 U.S. 121, 75 S. Ct. 127, 99 L. ed. 150; *Dupree* v. *U.S.*, (CCA-5-1955) 218 F. 2d. 781; *U.S.* v. *O'Connor*, (CA2-1956) 237 F 2d 466; *U.S.* v. *Williams*, (CA3-NJ) 208 F 2d 437; *Steele* v. *U.S.*, (CCA-5, 1955) 222 F 2d 628; and others noted in the petition.

[2] *Holland* v. *U.S.* (supra); *Dorsey* v. *U.S.* 108 U.S. App. D.C.——, # 15709, decided June 30, 1960, 281 F. 2d 71; and *Barry* v. *U.S.* #15765 US App. D.C. not yet reported, decided Jan. 12, 1961.

[3] *McCue* v. *U.S.*, 160 F. Supp. 595 (DC Conn. 1958); *Spies* v. *U.S.*, 317 U.S. 492, 63 S. Ct. 364, 87 L. ed. 418; *James* v. *U.S.*, 238 F. 2d. 681, *McClanahan* v. *U.S.*, (CCA-5, 1959) 272 F 2d 663; *Lewis* v. *U.S.* 146 US 370; *Diaz* v. *U.S.*, 223 U.S. 442; *Hopt.* v. *Utah*, 110 U.S. 574; *Snyder* v. *Comm. of Mass.*, 54 S. Ct. 330; *Fisher* v. *U.S.* 328 US 463, 66 S. Ct. 1310, 90 L. ed. 1382

ARGUMENT

I. It Was Error to Submit to the Jury a "Net Worth" Tax Evasion Case Where the Government Failed to Establish a Firm Opening Net Worth, Or Any Unwarranted Increase In Net Worth, Omitted Substantial Additional Opening Assets and Failed to Run Down "Leads" Furnished by Defendant.

In spite of the rules spelled out in *Holland* v. *U.S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, outlining the criteria for the guidance of Federal courts in trying and reviewing tax evasion cases prosecuted under the "net worth" theory, the Court of Appeals, by affirming the judgment of the District Court in *U.S.* v. *Abraham Chaifetz*, 181 F. Supp. 57, aff'd .... U.S. App. D.C. ...., No. 15,662, decided November 10, 1960, ignored and refused to follow, every rule laid down by the Supreme Court in *Holland*.

The Supreme Court while permitting the use of the net worth method of proving income tax evasion cases, has pointed out the dangers to a defendant where such a theory is used.

> "* * * we must start with the basic premise that careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use. * * * Appellate courts should review net worth cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation * * *" *Holland* v. *U.S.*, *supra*.

Where the Government undertakes to prosecute a tax evasion case by using the net worth method, even though this, in effect, shifts the burden to the defendant to prove his innocence, the prosecution still has the burden of certain duties and obligations before even a *prima facie* case can be established.

First, the prosecution must establish a firm and accurate figure as defendant's net worth at the starting point.

Second, the Supreme Court said in *Holland* that the government may NOT disregard a taxpayer's explanation of the source of net worth increases when such explanations are reasonably susceptible of being checked, because increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. Further, this Court said, the government has a DUTY to investigate leads furnished by the taxpayer.

When the agents failed, as they did here, to track down the leads furnished by defendant, it was the duty of the trial judge to direct a verdict of acquittal, instead of requiring defendant to prove the leads previously furnished. When the defendant later proved that the leads were true, and that he had some $37,000 in additional assets at the starting point omitted by the agents, there was no excuse for the trial judge to refuse to direct a verdict. But refuse he did.

The failure of the government's net worth, coupled with the failure of the Agents to run down leads furnished by defendant, was alone sufficient to require a judgment of acquittal by direction of the court. *A fortiori*, where as here, the defendant affirmatively established the omission by the agents of opening assets more than sufficient to explain the alleged increase in net worth.

In *Bryan* v. *U.S.* (CA Fla 1949), 175 F.2d 223, aff'd 338 U.S. 552, 70 S.Ct. 317, 94 L.ed. 335, the court there said:

> "* * * Where the government's net worth computation for the starting point is affirmatively shown to be erroneous and to have excluded assets at the starting point which account for the alleged increase in net worth; or putting it in another way, where the purported increase in net worth is nothing more than the excluded assets owned by the defendant at the starting point, but excluded in the government's computation, then the government has failed to prove a case on the 'net-worth' basis."

In *U.S.* v. *Fenwick*, (CA 7-1949) 177 F. 2d 488, the court there stated:

> "• • • Where the government has failed to prove with reasonable accuracy the defendant's net worth at the beginning and where there is no proof that defendant had not accumulated cash or assets other than those credited to him, over prior years, • • • the government has failed to establish • • • the guilt of the defendant (as required under the Holland case rule). • • •"

From the evidence in the Chaifetz case, no reasonable man could have found that the government had established either a *firm* starting point or that he did not have the additional assets claimed at the beginning of the base year, because your petitioner proved by undisputed testimony and evidence that he had substantially more assets *five* years before the starting point and that he had some $37,000.00 more assets at the beginning of the year 1951, the first year of the prosecution period—$37,000.00 more than was credited to him by the government in its net worth computations!

—o—

In the *Holland* case, *supra*, this Court stressed and pointed out that:

> "• • • the government may not disregard a taxpayer's explanations of the source of net worth increases when such explanations are reasonably susceptible of being checked (because increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income) • • • (and) "the government has a duty to investigate the leads furnished by the taxpayer. • • •, which, if true, would establish the taxpayer's innocence. *When the Gov. fails to show an investigation into the validity of such leads, the trial court may consider them as true and the Government's case insufficient to go to the jury.* • • • (Emphasis supplied) 75 S. Ct. at 135.

Indeed, this rule has been said to be designed to aid in forestalling unjust prosecutions and to have the practical effect and advantage of eliminating the dilemma, especially serious in net worth cases, of the accused being forced to come forward to substantiate leads which he had previously furnished the government.

In *Dupree* v. *U.S.*, 218 F. 2d 781, citing *Bryan* v. *U.S.*, 5 Cir., 175 F.2d 223, and ruling pronounced in the *Holland* case, *supra*, the court established once more the responsibilities of the prosecution in net worth cases. There as here, all of those responsibilities were not fulfilled by the government and the case was reversed. The court indicated too, the lack of proper instructions on the part of the trial judge: "* * * The charge was not adequate in the circumstances of this trial. * * * (and) was therefore not adjusted to the evidence of the Government's theory of proof. * * *"

Your petitioner as noted in the questions presented, the summary of the case and in this argument, makes the same complaint and maintains that his contentions are borne out by the record herein. (See charge of court to jury, pp. 747 to 783.)

Chaifetz proved, and the agents admitted their failure to run down the leads he had furnished relative to substantial assets owned by him at the starting point of the government's net worth computations but not included thereon by the agents.

Special Agent McIntyre displayed complete ignorance of the meaning of "leads" (R. 390-401) and both agents admitted they had not visited or questioned *any* of the persons named by the defendant, and who had furnished affidavits, to ascertain whether those persons owed the defendant money at the starting point which was repaid during the indictment years. Instead, *without a scintilla of evidence to support their conclusions and assumptions,*

they testified that no loans were outstanding, or if made, were repaid prior to the base year.

In a recent decision handed down by the Second Circuit, reversing the District Court in the now famous Apalachian case, not yet reported, the reviewing court described the government's efforts to convict the defendants as a "bootstrap operation" based on "crash methods."

Such a description is appropriate in the Chaifetz case where the agents substituted estimates, approximations, hearsay, personal opinions and assumptions, in place of proof, while attempting to meet the prosecution's burden. (See also *U.S.* v. *Williams*, (CA 3-N.J.), 208 F. 2d 437.

Still, the court below ignored all of the defendant's contentions and proof that the government failed to establish a firm opening net worth, failed to follow up the leads furnished, failed to establish an increase in the net worth for the years in question and permitted the case to go to the jury.

Informed courts hold (cases cited previously) and it has been ruled by *this Court*, in such cases, "that a motion for a judgment of acquittal must be granted." *U.S.* v. *Riganto* (1954-D.C. Va.), 121 F. Supp. 158.

Vlontis v. *U.S.*, 219 F. 2d 782 (CA 5-1955).
U.S. v. *Donovan*, D.C. Va. 1956, 142 F. Supp. 703
U.S. v. *Bally*, D.C. Conn. 1956, 143 F. Supp. 283.
U.S. v. *O'Connor*, CA 2-1956, 237 F. 2d 466.
Dupree v. *U.S.*, CCA 5-1955, 218 F. 2d 781.
U.S. v. *O'Malley*, D.C. Pa. 1955, 131 F. Supp. 409.

Your petitioner submits that for the reasons stated sending his case to the jury under the circumstances shown was error requiring reversal and that even for no reason other than this ground, the petition for the writ of certiorari ought to be granted, especially since the decision and affirmance by the reviewing court below is in conflict with the decisions of the courts in the third, fifth, seventh circuits *and* the Supreme Court.

II. Permitting a Switch From a Net Worth To a Specific Item Basis, the Use of Incorrect Charts, Assumptions and Hearsay Conclusions of the Agents, Combined to Deprive Defendant of a Fair Trial Resulting in His Conviction for the Middle Year (1953) on a Specific Item Basis, and Was Plain Error Under Rule 52 (b), F.R. Cr. P.

Instead of the prosecutor using the ORIGINAL government net worth chart, as furnished to Chaifetz after his arraignment (D.Ex.No.41-R.845-847), the prosecutor offered in evidence a new chart (Govt. Ex. No. 66 R. 881-884), containing several changes and corrections, made without notification to the defendant prior to trial.

Although taken by surprise, the defendant was able to explain the discrepancies and pointed out the errors, omissions and inaccuracies.[1]

Later, during the trial, the trial judge, over objection, again permitted the government to change its net worth chart, by correcting the amount of Series E Bonds, and by adding an "overlooked" asset. Although the prosecutor stated he was not including living expenses to determine the reconstructed net worth, he also made sure that Govt. Ex. 66 carried the legend, next to the heading of "additional net income" NOT INCLUDING PERSONAL LIVING EXPENSES, all in capitals so the jury could see it when they took it to the jury room.

When asked whether he had included ALL of the defendant's assets at the time he prepared the opening net worth chart, Agent Hein replied: "All that we were able to find" (R. 320).

[1] Idlewild first trust was pledged for a collateral loan as testified by government witness Bonze. Agents listed the asset but omitted the liability. Packard stock was carried as an asset for all years on government's original chart, but carried only at starting point on new chart. Second trust of Alice Lee Hart on 5072 Just Street was not on government's original chart but was added to new chart. Series E bonds were carried at a lower figure on Government's original chart but corrected to correspond with defendant's figure.

"This is not an affirmative answer to the question asked; it shows uncertainty rather than positiveness, and warrants reversal!" *Bryan* v. *U. S.*, 175 F. 2d 223; affirmed, 338 U.S. 552, 70 S. Ct. 317, 94 L. ed. 335.

Admitting in evidence Govt.'s Exh. No. 66, an erroneous net worth chart, and permitting it to be taken into the jury room, as a summary of the evidence, was plain and prejudicial error requiring reversal, since it did not correctly summarize the evidence but contained omissions, interpretations and discrepancies between the record and the chart or exhibit, evaluated the evidence, passed on the credibility of witnesses and weight of evidence, and contained the assumptions and conclusions of the Revenue Agents rather than a summary of the evidence.

The admission in evidence of such erroneous charts has been held to be prejudicial error requiring reversal of the conviction, and such practice has been condemned.

Steele v. *U.S.*, (CCA-5, 1955) 222 F. 2d 628.
Altruda v. *U.S.* (CCA-2, 1955) 224 F. 2d 935.
U.S. v. *Ward* (CCA-3,) 169 F. 2d 460.
Elder v. *U.S.* (CCA-5), 213 F. 2d 876.

In *Steele* v. *U.S.*, *supra*, the Court said:

> "Sending such exhibits into the jury room, allowed the jury to consider this act of the court as investing the exhibits with an air of credibility, as demonstrative evidence over and above, and independent of, the evidence which they purported to summarize and embody, with the undoubted effect of completely erasing from the minds of the jury any therapeutic effect of the charge to the jury that 'the exhibits were not original evidence and were not binding on the jury' was intended or calculated to have."

By permitting this plain error to go unnoticed, in effect approving the practice, the Court below is in conflict with the practice and decisions of the Second, Third and Fifth Circuits.

III. Unreasonable and Arbitrary Restriction of the Number of Character Witnesses Callable by Defendant in a Case Based on Circumstantial Evidence, Was Prejudicial Error.

In his opening statement, former defense counsel stated that defendant would produce reputable character witness including the Hon. F. Dickinson Letts and other judges, to testify to his good character. (R. 73). In a case based on circumstantial evidence, such as this, the importance of character testimony cannot be over-emphasized; it alone can create a reasonable doubt where otherwise one might not exist. Yet the trial court arbitrarily and unreasonably restricted the number of character witnesses callable by defendant to FOUR, over objection of defendant. (R. 668). Defendant proffered character testimony of Judge Letts and other character witnesses who were then present in court, but even the proffer was compelled to be made at the Bench, (R. 668) so that the jury was not apprised that the limited number of character witnesses was due to the restriction by the Court. Although requested to tell the jury that this restriction was by the court, the judge refused to inform the jury that there were many other character witnesses including District Judge Letts, who were ready, willing and able to testify to the good character of defendant but for the restriction by the trial court. (R. 668-670). As a result of this arbitrary restriction, the jury was permitted to infer that the defendant was unable to produce more than four character witnesses. By this arbitrary restriction, defendant was precluded from establishing his "good character" by a reasonable number of witnesses, and was further deprived of the opportunity to create a "reasonable doubt." We believe that this conduct by the trial judge not only violated the concept of fair play but contributed to the denial of a fair trial. This error alone is sufficient to justify reversal of the conviction.

IV. In An Income Tax Evasion Case, Denial of Motion to Strike Government Employees From the Jury Panel Coupled With Systematic Exclusion of Jews and Inclusion of Government Employees, Deprived Defendant of a Fair Trial By An Impartial Jury.

Due process as well as the Sixth Amendment require a fair trial by an impartial jury. All federal government employees who receive their compensation from the United States have a direct interest in the issues involved in a tax evasion case:—the collection of income taxes.

The panel of prospective jurors contained 311 names, 194 of whom were active government employees, 15 more were retired government employees, and others such as housewives and retired, whose present or past affiliations with the government, through marriage, employment or otherwise, were unknown. (80% of the total revenues collected by the U. S. Government consists of INCOME TAXES, excise taxes accounting for 12% and the remaining 8% made up by miscellaneous receipts. (Vol. 46 ABA Journal 1311, Dec. 1960).

Ex Parte Milligan, 71 U.S. 2, 4 Wall. 2, 18 L.ed. 281, holds:

> "A jury with 12 people on it may not always comply with the constitutional provision for a trial by an IMPARTIAL jury. From time immemorial, there was no subject upon which all Americans were more perfectly unanimous than they were in their determination to maintain this great right unimpaired."

At common law, a government employee could not sit on a jury in a criminal proceeding in which his employer was a party. Before the enactment of the statute which enabled government employees to sit on juries in the District of Columbia, a government employee was held disqualified from sitting on a jury in a prosecution for conspiracy to *defraud* the United States, because BIAS WAS IMPLIED BY LAW. *Crawford* v. *U.S.*, 212 U.S. 183, 20 S.Ct. 260, 53 L. ed. 465, *reversing* 30 App.D.C. 1.

In Crawford, a druggist whose store was designated as a postal sub-station and who was paid a fee therefor, was held to be disqualified because of his connection with the government

The Act of Aug. 22, 1935 (49 Stat. 682, ch. 605), amending D. C. Code Title 11, Section 1429, does NOT provide that government employees may sit in criminal trials where the government is a party. It merely states that they shall be *qualified* as jurors and not exempt from jury duty. Unquestionably, they may sit on all civil cases between private parties and in criminal cases where their employment is not connected with the type of case on trial. But in the present case, the collection of revenue from which they are paid being directly involved, they should be disqualified and peremptorily excused for BIAS IMPLIED BY LAW, in a tax fraud criminal case.

Where, as here, defendant has exhausted his peremptory challenges, and ten out of the twelve jurors were government employees, defendant was deprived of his constitutional right to a trial by an IMPARTIAL jury.

Although several cases decided by this Court have been concerned with the propriety of government employees sitting on criminal juries, the question was never presented in a tax evasion case where the jurors were paid from the revenues from which the Government had been allegedly defrauded.

In *Burgman* v. *U.S.* (88 App. D.C. 184, 188 F. 2d 637), the charge was treason; in *U.S.* v. *Wood* (229 U.S. 123, 57 S.Ct. 177, 81 L.ed. 78, rev. 60 App. D.C. 330), the charge was petty larceny; in *Frazier* v. *U.S.* (335 U.S. 497, 69 S.Ct. 201, 93 L.ed. 187) the charge involved a violation of the narcotic laws; and in *Dennis* v. *U.S.* (339 U.S. 162, 70 S.Ct. 519, 94 L.ed. 734) the charge was contempt for failure to obey a Congressional subpoena. None of these cases involved the revenues nor were the jurors directly affected because of

being compensated from revenues involved in the alleged attempt to evade income taxes.

In *Daniels* v. *Allen*, 344 U.S. 443, 73 S.Ct. 437, 97 L.ed. 469, this Court held that it is the responsibility of the Federal Supreme Court, under the Constitution, to redress "jury packing" * * * "a sinister art."

In the *Frazier* case, *supra*, the Supreme Court said:

> "In each case, a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on score of IMPARTIALITY, even though the basis may arise through the framework of chance or other unlawful factors wholly within the framework of proper procedures for selecting the panel and choosing the jury from it."

Systematic *EXCLUSION* of Negroes, women, and others has been condemned by this Court as a denial of the right to an impartial jury.

Hernandez v. *Texas*, 74 S.Ct. 667, 347 U.S. 475, 98 L. ed. 866.

Avery v. *Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.ed. 1244.

Patten v. *Miss.*, 332 U.S. 463, 68 S.Ct. 184, 92 L.ed. 76.

In *Oyama* v. *State of California*, 332 U.S. 633, 68 S.Ct. 269, at 270 et seq., the Supreme Court, in holding that a defendant's constitutional rights were denied in this manner, stated:

> "In approaching cases * * * in which federal constitutional rights are asserted, * * * there remains the question of whether discrimination on the basis of racial descent, as revealed in this case, is justifiable. * * * Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. * * * The rights of a citizen must not be subordinated merely because of his father's country of origin. This denies the defendant the equal protection

of the laws and that failure to grant defendant's plea * * * takes property * * * without due process of law."

Systematic *INCLUSION* of government employees in order to *pack* the jury in favor of the prosecution, is equally odious and equally prejudicial to a taxpayer in a tax evasion prosecution.

The Chaifetz case clearly discloses a calculated and systematic INCLUSION of government employees and a systematic EXCLUSION of all jurors of the Jewish faith, and even those whose names sounded Jewish, by the peremptory challenging tactic of the prosecution, and the creation of fertile soil for the injection of the religious issue by the prosecutor when he asked the defendant's brother, subpoenaed as a government witness, if he and defendant's mother spoke in YIDDISH in the presence of the revenue agents—for the sole purpose of creating anti-Semitic feeling and prejudice against the defendant. THIS ERROR CALLS FOR REVERSAL.

V. Failure To Give Any Instruction For the First Three Years, of a Five Year Indictment, On the "Lesser Included" Offense, Precluding Acquittal If Only a "Lesser-Included" Offense Had Been Committed, Was Prejudicial Error.

Rule 31(c), Federal Rules of Criminal Procedure provides that a defendant may be found guilty of an offense necessarily included in the offense charged. Although the trial judge agreed with defendant's contention that the lesser offense of WILLFULLY failing to supply information required by law, contained in *26 U.S.C.A. sect. 145(a)*, under the 1939 Code and *26 U.S.C.A. Sect. 7203* under the 1954 Code, was necessarily included in the felony charged and was justified by the evidence, he gave a "lesser-offense" charge for 1954 and 1955, but refused to give such a charge for 1951, 1952, and 1953, (R. 784-785) because the "lesser offense", a misdemeanor, was barred by limitations for those years.

The Court of Appeals, in the instant case, devoted all but the last paragraph of its seven page decision to a discussion of the "lesser offense" instruction, and completely ignored all other assignments of error and other plain errors existing on the face of the record, holding that because defendant could not be convicted of the lesser included offense, he was not entitled to a charge thereon. It did not reach, or chose to ignore, the question whether the lesser offense was included in the felony charged, or whether the jury should have been instructed to acquit, if Chaifetz had committed the lesser offense in 1951, 1952 and *1953.*

By this decision, the court below repudiated the Supreme Court's ruling in the case of *Spies* v. *U.S.*, 317 U.S. 492, 87 L.ed. 418, 63 S.Ct. 364, reversing 128 F.2d 743. Mr. Justice Jackson, speaking for the Court, said:

> "We think it is clear that this felony MAY include one or several of the other offenses against the revenue laws."

In an enlightening opinion, District Judge Anderson, in *U.S.* v. *McCue*, 160 F.Supp. 595 (D.C. Conn. 1958), analyzed the offense of "willful failure to supply information" (Section 145a) leaving no room for doubt that it is necessarily included in the felony of attempting to evade tax by filing a false and fraudulent return.—"The test to be employed is whether it is possible to commit the greater offense without first having committed the lesser offense. (See *James* v. *U.S.*, 238 F.2nd. 681)."

That the lesser included offense was barred by limitations for 1951, 1952 and 1953, should not have affected the rights of defendant who was ENTITLED to such a charge. Were it not for limitations, the trial judge would have given the charge for all five years. By not giving this instruction for the first three years, the jury was precluded from finding that defendant had committed the lesser included offense in 1953, and based on that finding, to ACQUIT.

They were led to believe that the lesser offense was in no way involved for the earlier years. It was for the jury to determine what offense, if any, had been committed in 1953; felony, misdemeanor or none. They were compelled to choose between felony or acquittal. The failure to instruct on this crucial issue was fundamental error entitling defendant to reversal of the conviction.

VI. It Was Error To Submit to the Jury For Its Determination a Question of Law Concerning Gift Tax Regulations for 1953 and 1954.

Several months prior to his death on December 30, 1953, Louis Chaifetz, father of defendant, turned over $9600 to the defendant to pay for his funeral, tombstone and to support Ida Chaifetz, the widow of deceased and mother of defendant. This transfer of funds was established by the testimony of members of his family who had personal knowledge of the transaction through conversations with the deceased prior to his death, and who had heard the dying declarations of Louis Chaifetz. (R. 432-433, 437-438, 470, 472).

Agent Hein admitted that defendant had told him and Special Agent McIntyre about this in September 1956, three years before the trial, (R. 354-356), but the prosecutor attempted to negate and becloud the issue by testimony that no gift tax return had been filed.

Defendant contended then, and contends now, that no gift tax return was required because the transaction was NOT A GIFT. Under the *Revenue Act of 1950*, approved September 23, 1950, (*I.R.C. Sec. 811 (c) and (d)*) transfers within three years prior to death were presumed to have been made in contemplation of death and were includible in the estate tax return of the decedent. Section 111 of the Act provided that no estate tax return had to be filed unless the estate exceeded $60,000 at date of death.

In any event, no gift tax return was required, since the transfer was about six months prior to the death of Louis Chaifetz, the transferor.

It is to be noted that defendant did not have to prove receipt of this non-taxable item from his father, since he had already proved that he had more additional assets at the starting point of the net worth computation period to explain an alleged increase in net worth *through 1953*, the only year for which defendant was found guilty of tax evasion.

We say that by creating this false issue and the erroneous instructions given thereon as shown elsewhere herein, and the improper implications and innuendos indulged in by the prosecutor, that defendant was denied a fair trial and was denied "due process" and for this reason too, the conviction should be reversed.

VII. Plain Error Was Committed When the Trial Judge Failed To Give Fundamental Instructions and Gave Erroneous Instructions on Vital Issues in the Case.

In *SCREWS* v. *U.S.*, 325 U.S. 91, Mr. Justice Douglas wrote:

> "In a criminal case, it is always the duty of the court to instruct on all essential questions of the law, whether requested or not."

But in the instant case, expressly denominated as a NET WORTH case, and tried as such, the trial court gave a two and one-half hour charge which was so disjointed, unbalanced and slanted in favor of the prosecution, that an acquittal for the year 1953 would have been miraculous.

Again and again, the jury was instructed how to find the defendant guilty, but only in rare instances were they told how to find him NOT guilty. (The entire charge is found herein Record pages 747-782.)

The instruction * * * "the jury should not give more weight to the testimony of the Revenue Agents merely because of their employment", was nullified, with prejudicial effect, when the instruction, as given, told the jury:

> "You must not give any special weight to the testimony of the Bureau of Internal Revenue employees merely because they are employees of the Government, CHARGED WITH CERTAIN RESPONSIBILITIES UNDER THE TAX LAWS," (R. 751).

The additional description of the agents' duties unduly and unfairly emphasized their credibility against that of any defense witness and in effect told the jury that the agents were only doing their duty.

In its instruction on the effect of character testimony, the trial court nullified that instruction by inserting a double negative or redundancy, thusly:

> "The evidence of good character, when taken or weighed with all the other evidence in the case, may OR MAY NOT be sufficient to raise a reasonable doubt WHERE ONE OTHERWISE MIGHT NOT EXIST", (R. 752).

For the instruction to be fair and impartial, one of the phrases, "or may not be", or, "where one otherwise might not exist", should have been omitted. As stated, the character evidence was either insufficient or the jury was led to believe that a reasonable doubt might not exist—Two AGAINST the defendant, and only one, in favor.

The trial court instructed the jury that their verdict depended on the following ultimate questions of fact: (R. 756 et seq.):

> "First, was there a greater tax due from the defendant for the year in question than was shown on the defendant's tax return for that year?
>
> "Second, did the defendant know that there was a greater tax due than was shown on the income tax return in question?

> "Third, did the defendant willfully attempt to evade the tax known by him to be due by filing * * * a false income tax return?"

But nowhere did the trial court explain how net worth ties in with these questions before they can be answered!

The trial judge FAILED to tell the jury that "there is no evidence in the case indicating a greater tax due than shown on the defendant's returns, except from the assumptions and conclusions of the Revenue Agents that there was an increase in net worth in each year, and that the computation indicating an additional tax due was based on those assumptions and conclusions.

The trial court, failed to explain to the jury that there was no evidence in the case that defendant *knew* that there was a greater tax due, and that they would have to make such an inference based on the inference or assumption, first, that there was a greater tax due, which would have to be based on a prior inference that there was an INCREASE in net worth for the year in question.

The trial court failed to explain that there was no evidence that the defendant willfully attempted to evade the tax known by him to be due, by filing a false return, because such a determination would have to be inferred from "all the prior inferences precedent"—if we may use that expression.

By this type of instruction, omitting all inferences favorable to the defendant, the jury was permitted to infer that they could find the defendant guilty as charged, basing their verdict on specific items of omission, since they could infer that if any specific items had been omitted, an additional tax was due thereon.

One need but examine the language of the prosecutor's closing argument, hammering away at the specific items for 1953, (R. 741-742) to conclude that there is no other logical

explanation for the conviction under Section 145(b) for 1953, since the jury acquitted the defendant of tax evasion for the years 1951, 1952, 1954 and 1955, thereby repudiating the government's net worth computations completely and accepting defendant's evidence and testimony concerning his assets existing at the start of the prosecution period.

The trial court's acquiescence in going along with the prosecutor's efforts to convict the defendant for 1953 via the "specific item" method is further demonstrated by an excerpt from the court's charge:

> "• • • the government does not have to prove evasion of the entire amount of tax liability charged, but it is sufficient to prove that the defendant attempted to evade a substantial amount of his tax liability for the particular year in question. • • • it is sufficient if SUCH ITEMS be proved to have existed in substantial amounts." (R. 757-758).

(The year 1953 had more specific items than any other year; more than the other four years combined.)

Your petitioner contends that such an instruction invited a conviction based on the specific items omitted in 1953, even though it was proved that there was no concealment of such items; that they were for the most part deposited and identified in defendant's check stub deposit records, since, if items were omitted, obviously an additional tax was due thereon, regardless of the net worth computation.

The jury was told again, and instead, that "if they found that defendant's tax returns for the years involved did not *fully* and *correctly* report defendant's income, and the tax due thereon, and that the returns were filed in a willful and intentional attempt to evade and defeat payment of the income tax, CONVICTION WOULD BE WARRANTED" (R. 758, 759).

This was an erroneous and prejudicial charge and not proper where the prosecution has attempted to reconstruct

the taxpayer's income under the 'net worth' method. Here, not only had the prosecution stipulated that this was a net worth case and that it would not attempt to prove conviction on a specific item basis, but the court had ruled that the prosecution was precluded from obtaining a conviction on a specific item basis. (R.293, 296-7, 303). Both the prosecutor and Agent Hein knew that specific items omitted from income do not enter into the computation in a net worth case. (R.294, 302); that the reconstruction of income and the tax due thereon is computed on the basis of the alleged increase in net worth in any one year.

Of prime concern to both parties was the vital issue whether there was a net worth increase for ANY year involved. The jury was *never* told to determine that question, and without that determination, the Government's case necessarily had to fail.

In instructing the jury on the "net worth theory", the trial court failed to tell them that the PRIMARY question in the instant case was the *starting net worth*, and whether or not there was an *unaccounted* increase in net worth for any year involved which could conceivably be additional income on which tax was due, and that all other questions hinged on these basis propositions which had to be determined first; for, if there was no net worth increase proved beyond a reasonable doubt for the first year, or any year, it would not be necessary for the jury to go any further, since the case should be ended due to the failure of the prosecution to prove a net worth case.

IT IS INCREDIBLE, BUT TRUE, THAT NOWHERE WAS THE JURY TOLD THAT IF THE GOVERNMENT FAILED TO PROVE A NET WORTH CASE BEYOND A REASONABLE DOUBT THAT IT WAS THEIR DUTY TO ACQUIT, and not to decide other questions of fact.

THIS WAS FATAL ERROR, because although the trial court explained the nature of the net worth method, the

assumptions on which it rests, IT OMITTED the inferences available to the accused in such a case. In the *Holland case*, supra, this Court stated:

> "Trial courts should approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; *charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused.* • • •
>
> "*Appellate courts should review net worth cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.*"

The Court of Appeals not only ignored the plain error committed by the trial court, but also ignored the net worth aspect of this case although charged by the Supreme Court with the duty to review net worth cases carefully because of the circumstantial nature of the evidence where inferences are based on inferences.

Defendant was further prejudiced by the incorrect instruction given on the gift tax laws as shown hereinabove in connection with the funds left by his father in 1953.*

This "gift tax" instruction was incorrect because the Estate Tax Regulations (Int. Rev. Code—Sec. 811, (c) and (d)) and the Gift Tax Regulations 26 U.S.C.A. Sec. 1000 et seq (1939 I.R.C.) provide that transfers by decedents dy-

* Record 768: "The Court informs you that in 1953 and 1954 the law required that when a gift in excess of $3,000 was made in trust, notice thereof should be filed with the Internal Revenue authorities by either the beneficiary or the trustee • • • Defendant denies that this money comes within the trust provisions of the regulations of Internal Revenue, and it is *for you to determine from the evidence in this case what the actual situation is.*"

ing after September 23, 1950, are, unless shown to the contrary, deemed to have been made in contemplation of death if they were made within 3 years prior to death and are INCLUDIBLE in the gross estate. Yet the trial court permitted the prosecutor to attempt to negate receipt of the money left by defendant's father by creating an issue as to propriety of filing a gift tax return, instead of telling the jury that the only issue in this connection was whether defendant did, in fact, receive this money.

Defendant was also prejudiced by the improper admission of information concerning his tax returns for prior years (1945-1950) and the instructions given thereon. (R. 761).* This instruction implied that defendant was guilty of tax evasion in prior years too. Instead of telling the jury to acquit the defendant if the government FAILED to prove a net worth case, this instruction was given: (R. 772):

> "If you find that any one or more of these requirements has not been established beyond a reasonable doubt with respect to any year in question, then you must find that the government's net worth contentions *have not been sustained* as to any such year or years". Nowhere is the jury instructed that in such event, they must acquit. This is PLAIN ERROR and petitioner prays that this Court deem it of sufficient importance to reverse the judgment below.

In *Bollenbach* v. *U.S.*, *326 U.S. 607*, at 612, a conviction was reversed because of an erroneous instruction, the Supreme Court holding that "discharge of the jury's responsibility for drawing appropriate conclusions from the testi

*"The government has introduced into evidence income tax returns * * * for years preceding 1951 and other evidence which purports to show understatement of income in the years preceding 1951. This evidence is to be considered by you on the issue of wilfulness during 1951 through 1955 only, as the defendant does not stand indicted for any year other than 1951 through 1955."

mony depended on the discharge of the judge's responsibility to give the jury *the required guidance by a lucid* statement of the relevant legal criteria".

This is equally true where the trial judge fails to give the jury the required guidance, BY A FAILURE TO INSTRUCT, and constitutes "plain error" which this Court may notice under Rule 52(b), F.R.Cr.P.

The Court of Appeals for the District of Columbia has recognized and applied this rule in other cases, as recently as January 12, 1961.

Steward v. *U.S.*, 101 App. D.C. 51; 247 F.2d 42.
Tatum v. *U.S.*, 88 App. D.C. 386; 109 F.2d 612.
Williams v. *U.S.*, 76 App. D.C. 299; 131 F.2d 21.
Barry v. *U.S.*, No. 15765, U.S. App. D.C. Dec 1-12-61 (not yet reported).

In the *Barry case*, Judge Fahy said:

> "But the responsibility of instructing the jury upon the essential elements of a crime rests upon the court. Failure to meet this special responsibility of the court itself need not be overlooked by an appellate court because overlooked by counsel. • • •
> *U.S.* v. *Atkinson*, 297 U.S. 157, 160.
> *Elgutt* v. *U.S.*, 197 U.S. 207, 221-222.
> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

The Supreme Court will also notice "*plain error*" to correct manifest injustice. *Fisher* v. *U.S.*, 328 U.S. 463; 66 S.Ct. 1310, 90 L.ed. 1382.

To repeat, when the trial court refused to instruct the jury on the crucial issue of the lesser included offense for the year 1953, it was a clear violation of defendant's fundamental right to a fair trial. This error, with the others noted above, is presented for the Court's attention and correction in the interests of justice.

VIII. Defendant Was Denied "Due Process" When the Trial Judge Gave a Secret and Erroneous Instruction to the Jury in the Absence of the Defendant, Without His Knowledge, Consent or Waiver, in Violation of Rule 43, F.R.Cr. P.

Rule 43, F.R.Cr.P., requires the presence of the defendant at every stage of the trial. The trial court violated this rule and by doing so denied the defendant "due process" in violation of the Fifth Amendment. This error is of such serious nature as to require reversal. During its deliberations the jury sent out a note to the trial judge requesting a certain exhibit (Def's No. 60 for identification—"the Philadelphia Conference Letter"). Without reopening the Court or sending for defendant, and without his knowledge or consent, the Trial Court violated Rule 43 and the fundamental rights of defendant by sending in a secret misleading and untrue answer to the request. Instead of advising the jury, in the presence of defendant and counsel, that the requested exhibit was not available to them because it was not in evidence but only marked for identification, the trial judge replied:

> "November 24, 1959. Received message 1:30 P.M.: after consulation with counsel, jury was informed that *no such exhibit EXISTED.*
>
> /s/ Luther W. Youngdahl"

This was prejudicial and not true! THE EXHIBIT DID EXIST!

Defendant was not informed of such request or given an opportunity to avail himself of any corrective remedy, such as a motion to re-open the case for purpose of admitting this exhibit.

Former defense counsel advised defendant that he did not recall being consulted about this note from the jury.

In *McClanahan* v. *U.S.* (CCA-5-1959) 272 F.2d 663, that Court of Appeals reversed a conviction of tax evasion on this ground alone, without reaching other errors as-

signed. This result is in line with other decisions of the Supreme Court which has criticized such procedure and reversed even in civil cases. In criminal cases, the rules are applied even more strictly.

Shields v. *U.S.*, 273 U.S. 583; 47 S.Ct. 478.
Fillippon v. *Albion Vein Slate Co.*, 250 U.S. 76.

The Court of Appeals below created a conflict with the Fifth Circuit when it ignored this error and passively approved the conduct of the trial judge in this respect.

The Supreme Court should settle this matter, not only because of the conflict between the circuits, but also because the decision flies in the face of previous decisions of this Court which are binding on all lower Federal Courts.

In *Hopt* v. *Utah*, *110 U.S. 574*, this Court held, "nothing shall be done after indictment in the absence of the prisoner".

In *Lewis* v. *U.S.*, *146 U.S. 370*, this rule was re-affirmed by the Court's statement that "* * * it is not within the power of either the prisoner or his counsel, to waive the right to be personally present during the trial of a felony". (See also *Diaz* v. *U.S.*, 223 U.S. 442).

In *Synder* v. *Comm. of Mass.* U.S. ; 54 S.Ct. 330, at 341, Mr. Justice Roberts, in his dissent, stated:

> "Our tradition, the Bill of Rights of our federal and and state constitutions, state legislation and the decisions of the Courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is the very essence of due process. * * * Speaking generally of the administration of criminal justice throughout the nation, this Court has said—'a leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the prisoner'—citing *Hopt* v. *U.S.*, *Lewis* v. *U.S.*, and *Diaz* v. *U.S.*, 223 U.S. 442, 32 S.Ct. 250. * * * The cases cited

> in the margin while by no means exhausting the authorities, sufficiently illustrate and amply sustain the proposition that the right is FUNDAMENTAL and assures him who stands in jeopardy that he may in person, see, hear, and know all that is placed before the tribunal having power by its findings to deprive him of his liberty or life. * * * As the cases show, the right of presence exists at every step of the trial, whether it be during the giving of oral testimony, the submission of a document, the presentation of physical exhibits, the argument of counsel, the charge of the court, or the rendition of the verdict".

Such a violation of a basic Constitutional Right ought not to be condoned by the Supreme Court and the erroneous conviction herein should be reversed.

IX. Misconduct of Deputy Marshal in Making Improper Remarks to the Jury and the Failure of the Trial Judge to Investigate the Charges to Determine Whether Defendant Was Prejudiced, Was Reversible Error.

Grievous error requiring reversal was committed by the Trial Court when it ignored the charges of misconduct lodged against the deputy marshal attached to the trial judge's court, at the hearing on the motion for judgment of acquittal, or, in the alternative, for a new trial. (R. 811 et seq.) These charges were brought to light after the verdict, when an alternate juror contacted former defense counsel and reported several prejudicial remarks made by the deputy marshal to the jurors during the trial.

The trial judge chose to ignore the accusations and evaded his plain duty to initiate an investigation to determine the truth of the charges and the existence of prejudice to the defendant.

Defendant was unaware of the details of the proceedings had at the Bench when the misconduct was first reported (R. 811 et seq.) because the reporter resigned soon thereafter and had gone to Texas and it was only after March

16, 1960, when defendant received the transcript of the proceedings of December 16, 1959, that he first discovered what had been said and done to deprive him of his right to a fair trial by an impartial jury.

Only the day before this was reported to Judge Youngdahl, he held that a failure to report to the Court that a juror knew a witness, was a contempt of court. *U.S. v. Henson*, D.C.D.C., 179 F.Supp. 474. His opinion in that case showed his concern for "an atmosphere of unbiased and scrupulous honesty" in the jury system and that a constant vigilance "must be maintained over the source and nature of *all information imparted to our jurors*".

In the main case in which the Henson contempt occurred, *U.S. v. Brown*, 179 F.Supp. 478, wherein the defendant was convicted of robbery, Judge Youngdahl, sui sponte, granted a new trial, although the court stated that it was unable to determine whether the defendant had been prejudiced by the familiarity between a juror and a witness.

Yet one day later, when a more serious disregard of the jury's sanctity is reported to the same judge, the situation is IGNORED.

If for no other reason than this occurrence, prejudicial error was committed for which this Court should reverse the conviction.

In *Remmer* v. *U.S.*, 347 U.S. 227, 74 S.Ct. 450, 98 L.ed. 654, this Court held that in a criminal case, ANY private communication, contact, tampering, directly or indirectly, with a juror during trial about the matter then pending, is presumptively prejudicial, and that once this is reported, the burden rests heavily on the Government to establish, after notice to and hearing of defendant, that such contact was not prejudicial.

When the misconduct of the deputy marshal was reported to the trial judge, a duty was imposed upon him to initiate such an investigation.

But, the trial judge chose to ignore this matter, denied all of the motions and sentenced defendant to imprisonment for 4 to 12 months and to pay a fine of $10,000 on count 3; and to 4 months and to pay a fine of $10,000 on count 4, with the fine suspended, and the jail term to run concurrently with that imposed on count 3.

The Court of Appeals, by remaining silent on this assigned error, condoned this procedure and ignored the decision of the Supreme Court in the process.

X. Permitting Revenue Agent to Testify As To Defendant's Returns As To Pre-Indictment Years, Instructing Thereon and Intimating That Defendant Was Guilty of Tax Evasion In Prior Years For Which He Was Not Charged, Was Error.

Revenue Agent Hein, the discredited "expert" witness for the prosecution, over defendant's objection, was permitted to testify from incomplete records and tax returns as to the returns filed and taxes paid by the defendant for the years 1945 through 1950, pre-indictment years. Without a scintilla of evidence to prove that those returns were either incorrect or that defendant had been guilty of any violation of the Revenue laws for those years, Hein was given free rein to comment and surmise as to the correctness of the returns, implying that defendant was guilty of tax evasion for those years as well (R. 698, 702, 727, 744).

In *Greenberg* v. *U.S.*, 280 F.2d 472, 1st Cir. 1960, a tax conviction was reversed because the agent's testimony there, as here, was strictly hearsay.

In *Paris* v. *U.S.*, 26 F. 529, 531, the court there stated: * * * "such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial".

In *Hargett* v. *U.S.*, 183 F.2d 859, at 863, citing *Boyd* v. *U.S.*, 142 U.S. 450, the court ruled: "However depraved in character and however full of crime their past lives have been, the defendants *were entitled to be tried upon competent evidence and only for the offense charged.*"

It is submitted that this ground alone warrants reversal.

XI. Prejudicial Tactics of the Prosecutor in Putting Words Into the Mouths of Witnesses, Making Unwarranted Remarks and Arguments, and Committing Other Acts Calculated to Inflame and Prejudice the Jury, Was Reversible Error.

In his opening statement, the prosecutor informed the court and jury that this was a net worth case; that the defendant kept a "double set of books; that his records were false and deceptive, and that his living expenses would NOT be included in the government's net worth computation (R. 66-68).

Although the government's net worth chart (G. Ex. No. 66) did not include living expense, as such, the prosecutor MADE SURE TO PRINT ON HIS EXHIBIT "NOT INCLUDING LIVING EXPENSES" and then had Agent Hein testify that "living expenses of about $5,000 per year were not included". (R. 205-6). This was repeated several times by Hein, to make sure that the jury got the point.

Petitioner reiterates that he was denied a fair trial and 'due process' by the prosecutor's "grand stand play" of the evidence he had amassed and intended to use in the trial of the case, magnifying the importance and the volume of the records, by rolling them into the courtroom, each day of the 6 weeks' trial, using a supermarket type of grocery cart as his file, and allowing the discredited Agent Hein to repeatedly point to the cart when he was unable to find an answer to a question. This, combined with the effect of parading before the jurors, eighty-seven purported witnesses, forty-four of whom were never called since their

testimony or records were stipulated before the trial started, together with the prosecutor testifying from the floor though not sworn as a witness, and putting words into mouths of witnesses; the planned striking of all Jews from the jury and then asking about a conversation in Yiddish between defendant's mother and brother, was deliberate and done only for the purpose of inflaming and prejudicing the jury against the defendant. Such prejudicial and improper conduct of a prosecutor, condoned by the trial and appellate courts, should not go unrebuked by the Supreme court.

In *Berger* v. *U.S.*, 295 U.S. 78, 55 S.Ct. 629, 79 L.ed. 1314, reversing 73 F.2d 278, this Court held that a prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to REFRAIN from improper methods calculated to produce a wrongful conviction. In that case, as here, the prosecutor's mis-statements of fact, in cross-examination, unsubstantiated intimations, pretense that the witness had said something he had not said, and persistent cross examination on that basis, bullying of witnesses and intemperate and misleading argument to the jury, were held so prejudicial as to require reversal of the conviction.*

XII. Trial Court Erred In Failing To Suppress Testimony of the Agents and Books and Records Fraudulently Obtained From Defendant in Violation of His Constitutional Rights and By An Illegal Search of Defendant's Office During His Absence.

At the trial, defendant testified that he had given his records to the revenue agents based on their express representations that the investigation was "only a routine audit", civil in nature, to determine whether he owed any

* Examination of Bomze (R. 95-103, 107), Chaifetz's brother re conversation with mother (R. 473-475), Chaifetz's sister (R. 433-436), Mrs. Johnson re loan to buy drug store (R. 581-583) and then on the 1953 income tax return (R. 675-676). Query: How could Louis Chaifetz, who died Dec. 30, 1953, sign and file a return *for* 1953 *in* 1954?

additional tax; that he was led to believe this by being requested to sign several waivers of the Statute of Limitations by being told that if this were a criminal fraud case, such waivers would not be necessary; and that the government could not collect any tax if he didn't sign, etc. (R. 500, 501).

Believing in the integrity of federal government agents, and the representations made, defendant freely turned over his fee books, check book stubs and other records, from which Agents Hein and McIntyre were able to obtain the names of every one of the clients and others with whom he had business dealing, and from which all of the information on the so-called specific items were obtained, since a mere comparison of the fee book and the bank deposit entries on the check stubs showed that several items had been omitted from the fee book. (This on its face showed no attempt at concealing income, since the fees were deposited and identified in the check stub entries).

Upon cross examination of the two agents, they contradicted each other as to what was found in the records they examined. (R. 36 and 51). Hein testified that he and McIntyre looked at papers in a box in defendant's office, during his absence * * * and McIntyre testified that "the defendant's then junior clerk presented some checks which Mr. Chaifetz left for us when he was not there; that they were not in a box he left cancelled checks on a desk for us. * * * we examined it * * * Mr. Chaifetz told us the day before what he would leave for us?". Chaifetz denied giving any permission to search his office during his absence. (R. 49-50).

Query: Would an attorney, under investigation by Internal Revenue, even though he knew he was completely innocent of any wrongdoing, allow Agents to search his office and go through his records, in his absence?

At the trial, Hein (R. 190) contradicted McIntyre again as to the cancelled checks by testifying that he never saw

any checks from Liberty or American Security and Trust Banks. * * *" He did make a box of mixed up papers available to us which were of no use". (The evidence at trial showed that the checks were in a box and never on a desk).

In *Old Colony* v. *Comm. of Int. Rev.*, 357 U.S. 28 at 32, 78 S.Ct. 1033, the Court stated:

> "This case presents an unusual case involving the integrity of a criminal trial in federal courts. * * * acting under the impression that no criminal proceedings were involved, he cooperated and signed waivers, etc. under 26 U.S.C. 275(c), 53 Stat. 85, 1939 I.R.C."

Although Old Colony was a civil case, the same situation prevailed in the instant case, and your petitioner prays that this Court declare that his records were obtained in violation of his constitutional rights, and reverse the conviction.

XIII. The Revenue Agents Were So Biased and Determined To Obtain a Conviction That They Indulged In Assumptions and Conclusions As a Substitute for Proof. This Was Plain Error.

Having recommended criminal prosecution of the defendant, Agents Hein and McIntyre were so biased and so determined to build a case against the defendant, that they indulged in assumptions, without verification which was available to them, gave incorrect and false testimony, and admitted that it was their intention to seek a criminal indictment while the investigation was still going on. Hein already had prepared a "rough net worth" computation, although he had never seen some of the tax returns for the years involved, and without checking with defendant to see whether any assets were omitted at the starting point. When "leads" as to additional assets omitted in Hein's opening net worth was furnished to Hein and McIntyre by the defendants, they ignored such leads, failed to track

them down or investigate them, and omitted substantial additional assets at the base period which would have shown any fair-minded agent that there was no real net worth increase, but merely a change in the form of the assets from 1950 to 1955.

Confucius is reported to have said: "There are none so blind as those who will not see". Agents Hein and McIntyre refused to see or recognize anything favorable to the defendant or detrimental to their criminal prosecution.

Hein's misleading and incorrect pronouncements of the revenue laws and as approved by the court, were highly prejudicial. He was forced to admit that he did not check the "cash flow", did not determine how much cash was deposited by defendant in his bank accounts; did not total or determine how much bonds were bought for cash from funds other than from matured bonds; did not trace the flow of cash from checking transactions where defendant deposited escrow moneys in his account, and disbursed such moneys from cash on hand and other transactions, such as outstanding loans receivable. McIntyre and Hein could have done all this very easily. Although affidavits were furnished to them giving names and addresses of persons indebted to defendant at starting point, the agents never asked one person whether they owed defendant the amount stated at the opening period or checked these leads.

Since the trial court and the appellate court failed to halt this unwarranted criminal case, petitioner is left to the mercy of the Supreme Court under its supervisory powers over the proceedings of federal courts to strike down a conviction secured by such unfair methods. In *Mesarosh v. U.S.*, 352 U.S. 1, 77 S.Ct. 1, 8, cited in *U.S. v. Shotwell Mfg. Co.*, 355 U.S. 233 at 234, 78 S.Ct. 245 at 247, the court said:

> "This is a federal criminal case and this court has supervisory jurisdiction over the proceedings of the federal courts. If it has any authority to perform in this regard, it is to see that the waters of justice are

not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity".

XIV. The Conviction on the 4th Count (for 1954) Can Not Stand Since Defendant Was Not Found Guilty of Any Crime Cognizable in Law.

The verdict returned by the jury on the fourth count (for the year 1954) was in writing, on a form prepared by the court, as follows:

"Guilty of failing to supply information required by law."

This verdict, purportedly a conviction on the lesser included offense, is an indication of how badly the court framed its instructions.

The written verdict, reproduced on page 806 of the Record, indicates that the word "willfully", which is a necessary ingredient of the lesser-offense contained in Section 145(a) under the 1939 Code and Section 7283 of the 1954 Code, was *conspicuously* absent. Upon being polled, each individual juror verbally repeated the written verdict, OMITTING the word "willfully".

Your petitioner contends that the Court of Appeals below has arbitrarily applied a different ruling in the instant case than that which it applied in *Dorsey* v. *U.S.*, 108 U.S. App. D.C. —; 281 F.2d 71, (No. 15709, Dec. 6-30-60) wherein defendant there was convicted of robbery, assault with a dangerous weapon and rape—the rape conviction was reversed, even though the sentence thereon was concurrent with the robbery and assault.

Petitioner takes issue with the Court of Appeals below that defendant is not harmed by refusing to consider the conviction on the 4th court or by its affirmance, on the ground that the sentence is a concurrent one. The Government, in it Brief on Appeal, conceded that the conviction

on this count cannot stand. But this conviction still stands, although both sides agree that it is erroneous.

When petitioner was found guilty of a "crime" which is not contained in the U. S. Code as a violation of law, and sentenced to a prison term of 4 months and a fine of $10,000 —the fact that the fine is suspended and the jail term is to be served concurrently with the sentence on the 3rd count, does not justify a conviction for a crime that does not exist.

A fortiori, where, as in this case, the government concedes that the conviction on this count is erroneous.

In the case of *Mosseau* v. *U.S.*, 266 F. 18, the court decided and ruled that "no conviction can be had for the violation of a statute for which no penalty is provided".

In the present case of *U.S.* v. *Chaifetz*, the error of the trial court and the failure of the Appeals Court to correct the error on count 4 is even more patent. No violation of ANY statute occurred nor was ANY crime committed by Abraham Chaifetz during 1954 for which any punishment could be meted out by the court. Yet, the record stands uncorrected to date and your petitioner respectfully prays that this court take cognizance of this plain error and reverse the conviction on this count.

CONCLUSION

Your petitioner has selected only a number of the glaring errors committed by the trial court, which errors were compounded by the Court of Appeals when it affirmed the judgment of the trial court without so much as considering these important questions, important not only to petitioner but to all taxpayers in the United States.

Although we believe that any one of the foregoing errors is sufficient in itself to warrant reversal, the "CUMULATIVE EFFECT OF ALL THE ERRORS SHOWN NECESSITATES THE REVERSAL OF THE CONVICTION IN THIS CASE." *Gordon* v. *U.S.*, 344 U.S. 414, 97 L.ed. 447.

In a "close case" an error which might otherwise be harmless, will be deemed prejudicial. *Bihn* v. *U.S.*, 328 U.S. 633; 90 L.ed. 1485.

Fundamental principles of liberty and justice have been disregarded in this case. In such a situation, the Supreme Court of the United States has never hesitated to exercise its jurisdiction to enforce the guaranty of constitutional rights and to make "due process of law" more than just a phrase in the Constitution.

For all of the foregoing reasons, we respectfully pray that this petition for certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15662

ABRAHAM CHAIFETZ, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided November 10, 1960

Mr. I. William Stempil, with whom *Mr. Abraham Chaifetz* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, WASHINGTON and DANAHER, *Circuit Judges*.

PRETTYMAN, *Circuit Judge*: Our appellant Chaifetz was indicted and tried on five counts for willfully attempting to evade federal income taxes for the calendar years 1951 through 1955, one count for each year. He was found not guilty on three counts and guilty on the third and fourth counts, relating to 1953 and 1954, respectively. He was given concurrent sentences on those convictions. This appeal followed.

In count three of the indictment, relating to the year 1953, Chaifetz was charged with the felony of willfully attempting evasion of income tax by filing a false and fraudulent income tax return.[1] Rule 31(c) of the Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of an offense necessarily included in

[1] Int. Rev. Code of 1939, § 145(b), 53 STAT. 63.

the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." Chaifetz contends the trial court erred in failing to submit to the jury as a lesser included offense the misdemeanor of willful failure to supply information required by law.[2]

Chaifetz asked the trial court to instruct the jury that, if it found he was not guilty of the felony but was guilty of the misdemeanor of failing to supply required information, it should find him guilty of the lesser offense. The entire requested instruction is in the margin.[3] Con-

[2] Int. Rev. Code of 1939, § 145(a), 53 STAT. 62 (amended by 57 STAT. 144 (1943)).

[3] The jury is instructed that with respect to the indictment alleging, for the years 1951 through 1955, a willful attempt to evade and defeat the payment of income taxes by the willful filing of a false and fraudulent return, there is within this charge a lesser included offense, namely, a violation of Section 145a of Title 26, 1939 Code, or Section 7203, Title 26 of the 1954 Code. This statute reads as follows:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

The jury is instructed that if from the evidence they believe that the defendant was not guilty of a felony or greater charge, but was guilty of the misdemeanor, namely, that he willfully failed to supply "any information" upon which his proper tax could have been computed, and you find it was done willfully, as this Court has defined the term to you, then it would be your duty to find him guilty of the lesser offense, and in your verdict you should say "guilty of violating the lesser included offense."

viction on the lesser offense was barred by the statute of limitations. The judge denied the request.

The applicable statute of limitations read:

> "No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, * * *."[4]

When this indictment was returned three years had elapsed since the commission of the alleged offense. So Chaifetz could not then be prosecuted, tried or punished for the lesser offense. We are of clear opinion that the trial judge was correct and that he should not have instructed as Chaifetz requested him to do.

The rule is well established that, when an accused is on trial for a felony (not barred by limitations), he cannot be convicted of a lesser included offense if the latter offense is barred. There are many cases on the point. References to a few, with their citations, will suffice. In *State* v. *King*[5] the Supreme Court of Appeals of West Virginia held that a person tried upon a felony indictment could not be convicted for an included misdemeanor barred by limitations. The defendant was indicted and tried for felonious assault. He was convicted of the misdemeanor of assault and battery. The trial court sentenced him. The appellate court set aside the verdict. It cited many cases in support of its view. And, to give another example, the Appellate Division of the Supreme Court of New York, in *People* v. *Di Pasquale*,[6] set aside a conviction for an attempt to commit murder, barred by limitations, when

[4] Int. Rev. Code of 1939, § 3748(a), 53 STAT. 461.

[5] 140 W. Va. 362, 84 S.E. 2d 313 (1954).

[6] 161 App. Div. 196, 146 N.Y. Supp. 523 (1914).

the trial was for murder, not barred. To the same effect is *Letcher* v. *State*,[7] in which the Supreme Court of Alabama remarked that "The law is well settled on the subject." Flatly, but without citations, the Supreme Court of Florida, in *Perry* v. *State*,[8] held that a trial court did not err in refusing to instruct a jury on lesser included offenses barred by limitations, where the indictment was for a felony not so barred. In *Spears* v. *State*[9] the Supreme Court of Alabama held:

> "The rule providing that every lesser offense is included in the one charged in the indictment applies and has reference only to every actionable offense and not the offenses which upon the face of the proceedings are barred by the statute of limitations, the operation of which rendered the court without jurisdiction to try and determine the so-called lesser offenses."

With many cases cited in support the rule is stated as follows in American Law Reports Annotated:

> "The rule supported by the overwhelming majority of cases is that one cannot be convicted of a lesser offense upon a prosecution for a greater crime which includes the lesser offense, commenced after the statute has run on the lesser offense."[10]

In cases in Texas[11] and Florida[12] it was held correct for the trial judge to instruct explicitly that the jury could not return verdicts of guilty to lesser offenses, ordinarily included, if convictions for those offenses were barred by

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[7] 159 Ala. 59, 48 So. 805 (1909).

[8] 103 Fla. 580, 137 So. 798 (1931).

[9] 230 Ala. 316, 160 So. 727 (1935).

[10] 47 A.L.R. 2d 888 (1956).

[11] McKinney v. State, 96 Tex. Cr. R. 342, 257 S.W. 258 (1923).

[12] Blackmon v. State, 88 Fla. 188, 101 So. 319 (1924).

limitations. The Supreme Court of Utah took a different view in *State* v. *Crank*[13] and held it to be error for the trial court even to mention to the jury lesser included offenses barred by limitations. Under either of these views the trial judge in the case presently at bar was correct.

As was pointed out by the Court of Appeals for the Sixth Circuit in *Benes* v. *United States*,[14] a statute of limitations in a criminal case, unlike such a statute in civil matters, is not merely a statute of repose but creates a bar to prosecution. Cases are cited in that opinion.

We had this problem in *Askins* v. *United States*,[15] and our present holding is in accord with that one. There the indictment was for first degree murder and the conviction was for murder in the second degree, the latter being then barred by limitations. We held the conviction to be barred, citing several of the cases hereinabove discussed.

It is true that the foregoing rule was developed as a response to efforts of zealous prosecutors to avoid the bar of a statute of limitations against lesser offenses. Faced with that bar, the Government upon occasion secured an indictment for a greater offense not so barred and then sought from court and jury a conviction of the lesser included offense. But the fact that in many of the cited cases the Government was seeking the instruction which would permit a verdict on the lesser offense, whereas in the case at bar the defendant is seeking that instruction, is immaterial. Instructions are the directions of the court as to the law in the case. They are the court's own directions. They are to be correct as to the applicable law. Who requests a given instruction makes no difference upon the problem of propriety. Of course a defendant

[13] 105 Utah 332, 142 P. 2d 178 (1943).

[14] 276 F. 2d 99 (1960).

[15] 102 U.S. App. D.C. 198, 251 F. 2d 909 (1958).

can sometimes waive an instruction to which he is entitled, or fail to claim one; but a requested instruction must truly reflect the applicable law, no matter who requests it.

Since Chaifetz could not, at the time of his trial, have been convicted of the misdemeanor of failing to file required information for the year 1953, he was not entitled to have the trial judge tell the jury it could, or should, find him guilty of that offense.

As we have noted, Rule 31(c) of the Rules of Criminal Procedure provides that an accused is entitled to instructions on "necessarily included" offenses. But that rule is not to be read as conferring a blanket right without qualification. Quite clearly it refers to offenses for which convictions might be had upon the proof adduced. Otherwise it would run counter to all accepted rules as to what a trial judge should or can charge a jury concerning permissible verdicts.

In the view which we take of this part of the case we do not reach the question whether the misdemeanor of failing to file required information was an offense "necessarily included" in the felony of willfully attempting to defeat or evade an income tax.

In count four the indictment charged willful attempt to evade income tax for 1954. The misdemeanor of willful failure to supply required information was not barred by limitations and was submitted to the jury by the trial court. The jury returned a verdict of "guilty of failing to supply information required by law". Chaifetz argues here that the verdict, omitting as it did the word "willful", was in effect a verdict of acquittal. The Government says that the conviction on this fourth count cannot stand, the premise for its conclusion being that this misdemeanor was not "necessarily included" in the felony charged. Therefore, the Government says, it was error for the trial court to submit the misdemeanor. The sentence on count

four is less than, and concurrent with, that imposed on count three. Since we have found the conviction on the third count must be sustained, under familiar principles it is unnecessary for us to consider the questions raised with respect to the fourth count. We do not consider them.

It is further alleged that appellant's cause as to all counts was prejudiced by the conduct of the prosecutor and the deputy marshal, by the jury's failure to comply with certain admonitions from the court, and by the conduct of the court itself. We have carefully examined these and the other arguments presented. We find no error requiring reversal.

Affirmed.

APPENDIX B

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States:

Fourth Amendment.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *

Fifth Amendment.—No persons shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Sixth Amendment.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *, and to be informed of the nature and cause of the accusation; * * *, and to have the Assistance of Counsel for his defence.

Title 26, U.S.C.A. sec. 145 (a)—1939 Internal Revenue Code:

Any person * * * required by law or regulations made under authority thereof to make a return * * *, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of * * * any tax imposed by this chapter, who willfully fails to pay such * * * tax, make such return * * *, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of the prosecution.

Title 26, U.S.C.A. sec. 145 (b)—1939 Internal Revenue Code:

* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thergof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 26, U.S.C.A. sec. 7201, 1954 Internal Revenue Code:

Attempt to evade or defeat tax. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 U.S.C.A. sec. 7203, 1954 Internal Revenue Code:

Any person required under this title to * * * keep any records, or supply any information, who willfully fails to pay such * * * tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 26, U.S.C.A. sec. 811, 1939 Internal Revenue Code:

Gross Estate (Estate Tax-basic tax, citizens or residents of the United States.—The value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) Transfers in contemplation of, or taking effect at, death

(1) General Rule. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(C) intended to take effect in possession or enjoyment at or after his death.

(e) if decedent within a period of 3 years ending with the date of his death transferred on interest in property—such transfer shall be deemed to have been made in contemplation of death. • • •

Title 26, U.S.C.A. sec 812. Internal Revenue Code, 1939 IRC.:

Net estate. For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

(a) exemption. An exemption of $100,000. • • •

Title 26 U.S.C.A. sec. 1000, Chapter 4—Gift Tax.—Imposition of Tax.—

(a) Transfers subject to tax; certin gifts not affected. For the calendar year 1940 and each calendar year

thereafter, a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

Federal Rules of Criminal Procedure:

Rule 31 (c): Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 43. Presence of the defendant. The defendant shall be present * * * at every stage of the trial * * *.

Rule 52 (b). Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FILED
APR 13 1961
JAMES R. BROWNING, Clerk

No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1960

ABRAHAM CHAIFETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33 18

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1960, and a petition for rehearing was denied on December 7, 1960. (Pet. 1a.) On December 29, 1960, Mr. Justice Brennan extended to February 5, 1961, the time within which a petition for a writ of certiorari might be filed. The petition was filed on February 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict of guilty as to Count III, involving the year 1953.

2. Whether the government improperly shifted, in mid-trial, from a net worth theory to a specific items theory because it was permitted to prove—on the issue of wilfulness—the omission of specific income, where petitioner was notified a year before the trial that the government intended to use such evidence.

3. Whether petitioner was deprived of a fair trial by reason of the fact that ten of the jurors were government employees.

4. Whether the trial court erred in permitting the jury to consider the failure to file a gift tax return as relevant to the question whether petitioner had received a $9,600 cash gift from petitioner's father.

5. Whether the trial court erred in instructing the jury.

6. Whether it was proper to admit evidence of the income reported by petitioner in his tax returns for years prior to the prosecution years.

7. Whether the trial court erred in failing to suppress evidence alleged to have been obtained by an illegal search, where the evidence at the pre-trial hearing was conflicting and where the issue was again raised at the trial and submitted to the jury.

8. Whether petitioner, charged in Count IV with having wilfully attempted to evade his 1954 income tax by filing a false and fraudulent return, was properly convicted of the misdemeanor of "failing to supply information" on the ground that it was necessarily included in the offense alleged in the indictment.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(a)(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at

the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7203.)

Federal Rules of Criminal Procedure:

RULE 31. VERDICT

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

STATEMENT

On January 7, 1958, petitioner was indicted in the United States District Court for the District of Maryland on five counts alleging the wilfully attempted evasion of his individual income taxes for the years 1951 through 1955, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The amounts of net income and the tax liability thereon, as re-

ported in the returns and as corrected, were alleged to be as follows (R. 8–11):[1]

Year	Net Income		Tax Liability	
	Reported	Corrected	Reported	Corrected
1951	$4,259.34	$18,027.51	$510.89	$5,412.03
1952	1,954.16	8,052.91	34.22	1,601.99
1953	2,019.50	13,299.47	48.73	3,585.78
1954	3,760.89	11,801.86	376.35	2,624.88
1955	3,244.79	7,224.24	250.09	1,171.44
Totals	$15,238.68	$58,405.99	$1,220.28	$14,396.12

In February 1959, upon petitioner's motion under 18 U.S.C. 3237(b), the case was transferred to the District of Columbia, where petitioner resides. (R. 1.) After a jury trial petitioner was found not guilty on Counts I, II and V; guilty as charged on Count III (relating to 1953); and guilty of "failing to supply information as required by law" (R. 800), a lesser offense which the trial judge had instructed the jury was necessarily included in Count IV (R. 777). On February 19, 1960, petitioner was sentenced to a prison term of four to twelve months and fined $10,000 on Count III, and to a concurrent term of four months plus a fine of $10,000 (which was suspended) on Count IV. (R. 829.) On appeal, the Court of Appeals affirmed. (Pet. 1a–7a.)

[1] The record in this Court consists of (1) the original papers certified to the Court of Appeals from the District Court—not referred to herein; (2) the joint appendix in the Court of Appeals together with the proceedings in that court, designated herein as "R."; and (3) the typewritten transcript of proceedings in the District Court, designated herein as "Tr.".

To prove that petitioner, an attorney, had realized net taxable income in excess of that reported, the government introduced evidence to establish that there were annual increases in petitioner's net worth, and that these increases represented current taxable income which substantially exceeded the amounts reported by petitioner in his income tax returns. The amount of net taxable income shown by the net worth proof for each year was substantially that alleged in the indictment (*supra*). (R. 229–230, 881–884.) The government's starting-point proof was designed to establish the falsity of the defense contentions that the apparent net worth increases derived from (a) cash on hand at the end of 1950, $20,000; (b) loans receivable at the end of 1950, $11,850; and (c) a cash gift to petitioner from his father late in 1953, $9,600. (R. 848–851.)

(a) *Cash on hand.* Petitioner claimed that he had $10,000 on hand at the end of 1945 (R. 848) and $20,000 on hand at the end of 1950 (R. 850).[2] The evidence showed that in 1957 petitioner admitted to the agents—in the presence of his attorneys—that at the end of 1950 he had only about $300 in cash, the amount of cash he usually carried; and that any other money that he had at home or in the office belonged to his

[2] Petitioner estimated that he was worth over $50,000 in 1937, when he began the private practice of law. (R. 495; Tr. 2012–2013.) This $50,000 included savings of $45,000 alleged to have been accumulated between 1928 and 1937, a period during which he received no gifts or inheritances. (R. 593.) From 1930, when petitioner came to Washington at the age of 19, he worked for the government until early 1937, earning salaries ranging from $1,440 to $1,500 a year. (R. 592–593; Tr. 2009.)

clients. (R. 227–228.) Petitioner submitted a net worth statement to a Washington bank in 1946 in which he entered no figure opposite the asset "Cash on hand." (Govt. Ex. 86; R. 603; Tr. 2284.) The net income reported by petitioner on his income tax returns from 1945 through 1950 averaged less than $2,000 a year. (R. 204–205, 700–702.)

(b) *Loans receivable.* The evidence showed, and petitioner's own net worth summary conceded, that all of the alleged $11,850 of loans receivable had been repaid to petitioner before 1953, the first year as to which he was convicted. (Govt. Exs. 87, 94, 99; R. 430, 433–434, 605–607, 689–690, 694–697, 712, 850; Tr. 1784, 2611.) There was also substantial evidence to establish that $3,100 of the loans had been paid off before the December 31, 1950, starting-point date (R. 690, 712; Tr. 2611; Govt. Exs. 94, 99); that although nothing could be found to substantiate the alleged $3,000 loan to one Robert Johnson, petitioner and Johnson had engaged in short-term loan transactions with each other by kiting checks between 1952 and 1955, petitioner paying over a total of $3,500 and receiving back a total of $3,400 (R. 694–696); that repayment of the alleged loan of $1,800 to petitioner's father was a part of the alleged $9,600 cash "gift" made by the father in 1953 (R. 522), although petitioner's net worth summary shows the $1,800 was repaid in 1951 (Deft. Ex. 45); and that none of the other loans could have accounted for any of the 1953 unreported income (R. 430, 433, 605, 683, 689, 694; Tr. 2588).

(c) As for the alleged cash gift of $9,600 received by petitioner from his father in 1953 (to cover the cost of the father's funeral and tombstone and to support his widow), it was shown that the widow (petitioner's mother) signed an affidavit stating that her husband had left her nothing of value when he died, except an automobile; that the father had never filed an income tax return prior to 1951, and, during 1951 through 1953 had earned less than $1,000 per year as a part-time house painter; that neither petitioner nor his father had filed any gift tax return during the years 1945 through 1955; and that since the $9,600 was allegedly given in cash and not deposited it could not have accounted for any of petitioner's assets shown on the government's net worth summary, all of which were acquired with funds from petitioner's bank accounts. (R. 397, 399, 472, 478–479, 675–678, 683, 697.)

On the issue of petitioner's wilfulness the government proved by direct evidence that in reporting a net income of $2,019.50 for 1953 petitioner had omitted specific legal fees, totalling $3,883.30, received by him that year. (Govt. Exs. 38, 39, 43A, 45 A, B, C, D, E, and F; 46, 47A, 48C, 50B, 59; R. 173–181, 210–217, 565–571, 763, 767; Tr. 603, 605, 689, 747–770, 773, 791–792, 814, 827–832, 902.)[3]

[3] The $3,883.30 figure represents the total of unreported 1953 fees that were either stipulated, admitted, or undisputed. It is made up of 15 separate items as follows: Uberman, $500; Deming, $500; Washington Novelty Co., $1,000; Israelson, $120; U.S. District Court records, $238.30; U.S. District Court records, $800; four $25 items from one Elbert Berry; Wilson, $5; Wilson, $20; Lewis, $250; Curd, $250; Reserve Life Insurance Co., $100.

ARGUMENT

1. There is no merit, as both courts below found, in petitioner's contention (Pet. 20–24) that the evidence was insufficient to support the conviction on Count III (1953). That contention rests basically upon petitioner's assertions that there was no fixed starting point for the net worth analysis and that the Treasury agents had failed to run down leads which he had furnished them as to (a) alleged additional assets owned by him at the starting point and (b) the alleged cash gift from his father. The record shows that the agents' investigation of the petitioner's financial history both before and during the prosecution years was extensive; and that the leads and explanations furnished by petitioner were either false or, if true, would have no substantial relevance to the issue of the amount of the unreported income for 1953. (*Supra*, pp. 7–9.)[4] The "loans receivable" were all paid off before 1953; there was no cash on hand; and the alleged $9,600 gift plainly could not account for any of the unreported income. (*Id.*) Moreover, since petitioner's own figures revealed a substantial understatement of income for 1953 (R. 852, 884), the only question for resolution as to that year was whether the understatement was willful. The finding

[4] We do not discuss 1954 because we believe it to be clear, for reasons stated hereinafter (*infra*, pp. 16–18), that petitioner's conviction for that year under Section 7203 of the Code—on the theory that that offense is necessarily included in the felony offense alleged in the indictment—cannot stand. As we have said (*supra*, p. 6), petitioner was acquitted as to 1951, 1952 and 1955.

of wilfulness implicit in the jury's verdict was completely warranted by evidence of (a) specific items of unreported income, almost twice the amount of the reported income (*supra*, p. 9) and (b) the keeping of false books supporting, within $100, the reported gross receipts figure (R. 194).

2. Equally without merit is the argument (Pet. 25–26) that the prosecution was permitted to switch methods of proof during the trial, and to convict petitioner upon proof of specific items of omitted income rather than upon net worth proof. The proffer of direct evidence was relevant to the issue of wilfulness; and, indeed, petitioner knew one year before trial that the government proposed to prove some 42 specific items of omitted income (R. 11–12) for the purpose of establishing that element of the offense (R. 59).

The argument (Pet. 26) that the trial judge erred in admitting in evidence the government's net worth summary (R. 881–884) and in permitting it to be taken into the jury room because it contained "the assumptions and conclusions of the Revenue Agents rather than a summary of the evidence" (Pet. 26) is not open to petitioner here, since it is in direct conflict with the position he took in the district court. There the defense recognized that the government's summary included only items which had been covered by the testimony (R. 201), and he expressly agreed that the jurors could take it into the jury room during their deliberations (R. 777–778). In these circumstances, petitioner cannot now charge the court with

having thereby deprived him of a fair trial. *Johnson* v. *United States*, 318 U.S. 189, 200–201.[5]

It is also contended that the trial judge should not have limited the number of character witnesses to four. (Pet. 27.) At the trial the defense agreed to

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[5] Several minor contentions advanced in the petition for certiorari are not open here, for the same reasons:

(a) That the court should have instructed the jury, with respect to the first three counts, that it might find petitioner guilty of the alleged lesser included offense of failing to supply information, in violation of Section 145(a) of the Internal Revenue Code of 1939. (Pet. 31–33.) At the trial the defense conceded that no such instruction should be given with respect to those counts because the statute of limitations barred prosecution for a misdemeanor for those years. (R. 746.) And see *infra*, pp. 16–18.

(b) That the trial judge erroneously told the jury that Defendant's Exhibit 60 was not in existence, when it did exist but had not been offered or admitted in evidence. (Pet. 42–44.) The record clearly shows that the message was conveyed to the jury "[a]fter consultation with counsel." (R. 797.) There is no merit in the argument that Rule 43 of the Federal Rules of Criminal Procedure was violated because the defendant was not personally present at the time of that consultation. He waived his rights under Rule 43 by voluntarily absenting himself after the trial had begun. *United States* v. *Noble*, 294 Fed. 689 (D. Mont.), affirmed, 300 Fed. 689 (C.A. 9th).

(c) That a deputy marshal made improper remarks to the jurors during the trial. (Pet. 44–46.) At the trial defense counsel thrice told the judge he did not want the alleged incident considered and did not want any action taken thereon. (R. 813, 815, 816.) The suggestion (Pet. 45) that the court, *sua sponte*, should have taken action overlooks the fact that no satisfactory showing of the circumstances surrounding the alleged incident was made. (R. 815–816.)

(d) That the prosecutor engaged in prejudicial tactics by bringing books and records into the courtroom in a "supermarket type of grocery cart." (Pet. 47.) At the trial defense counsel expressly stated that he was making "no point on that with [the prosecutor] having access to this cart." (Tr. 2797.)

limit the number of character witnesses to four. (R. 663.) Although this appears to have been modified in a later, somewhat confused colloquy between court and counsel (R. 668–671), the court's adherence to that number was clearly not a prejudicial abuse of discretion.

3. The District Court did not err (Pet. 28–31) in denying petitioner's motion to strike all government employees from the jury panel. In *United States* v. *Wood*, 299 U.S. 123, 133–134, this Court stated:

> All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had *actual* bias, and, if he had, to disqualify him. [Emphasis added.]

Here the trial court granted petitioner's motion to permit examination of the prospective jurors individually, and an entire day was consumed in selecting the jury. (R. 3; Tr. 1–186.) Six prospective jurors were excused for cause on the ground that they were employees of the Internal Revenue Service or were related to such an employee. (Tr. 37, 39–40, 173.) That ten of the jurors finally chosen were government employees does not mean that petitioner was denied a fair trial. Cf. *Frazier* v. *United States*,

335 U.S. 497. Nor would it appear that petitioner thought so; despite the fact that the indictment in this case was returned in the United States District Court for the District of Maryland, petitioner moved to have the case transferred for trial purposes to the District of Columbia, a change which he must have known was far more likely to result in government-employee jurors than would have been the case had it been tried in Baltimore.

4. Despite petitioner's contention to the contrary (Pet. 33–34), the trial court did not err in permitting the jury to consider the fact that no gift tax return had been filed in connection with the $9,600 cash gift allegedly received by petitioner from his father (*supra*, p. 9). Since one of the normally intended consequences of making a gift of such magnitude would be to effect an exclusion of the amount in the estate tax return of the donor, the filing of a gift tax return would be expected. In the circumstances, the failure to file such a return was certainly a fact which the jury was entitled to consider—assigning it whatever weight it deemed proper—in determining whether the alleged gift had actually been made.

5. With respect to the alleged (Pet. 34–41) errors of the trial court in instructing the jury, it is settled that the defendant is not entitled to instructions in any particular form; the question on review is whether the charge "was correctly given and adequately covered the various aspects of the case." *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396. The instructions in the instant case, examined

as a whole, meet that test.[6] In addition to the many, standard instructions customarily used in criminal cases, the court gave detailed instructions concerning the use of the net worth method, the necessity for accuracy in determining petitioner's starting point net worth and the agents' obligation to follow leads as to available assets (R. 763–767, 770–773); it also cautioned the jury in its use of the net worth summary charts (R. 773–774). Significantly, there is little or no correlation between the objections to the charge made at trial (R. 778–783) and those made here.[7]

6. The government made no effort to imply that petitioner was guilty of tax evasion for the years 1945 to 1950. (Pet. 46–47.) The returns for those years were introduced solely to bolster the net worth standing-point proof and to refute petitioner's claim

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[6] The clearly erroneous instruction given at petitioner's request—that the jury might find him guilty on Counts IV and V of merely having failed to supply information (R. 777)—is discussed *infra* at pp. 16–18.

[7] Petitioner misquotes a portion of the charge. (Pet. 37.) As given, the charge correctly stated that (R. 758–759):

> If the Government has proved to you, beyond a reasonable doubt, that the defendant's tax returns for either 1951, 1952, 1953, 1954 or 1955 did not fully and correctly report defendant's income and the tax due thereon in such year or years, this fact standing alone will not warrant a conviction. Conviction of defendant on the felonies charged will only be warranted if you further find that the Government has proved beyond a reasonable doubt that the returns were filed in a wilfull and intentional attempt to evade and defeat the payment of the income tax. The wilfull attempt to evade and defeat the payment of income tax is an essential element as to each year in question which must be proved beyond a reasonable doubt, just as any other fact in the case.

that he had $20,000 in cash on hand at the beginning of the net worth period. (R. 698, 701–702, 744.) The introduction of the returns was not only proper but necessary. *Holland* v. *United States,* 348 U.S. 121, 133; *Friedberg* v. *United States,* 348 U.S. 142, 144.

7. Petitioner contends (Pet. 48–50) that the trial court erred in failing to suppress certain testimony and in failing to remove from the jury's consideration certain books and records allegedly obtained by illegal search and seizure. The fact is, however, that the suppression issues were resolved by the trial court against petitioner at a pre-trial hearing, upon submission of conflicting evidence (R. 19–54) and that the court properly concluded that even if it was true that the agents had procured the books and records on their representation that they were to be used for routine civil tax purposes, suppression was not warranted (R. 55–59). *United States* v. *Sclafani,* 265 F. 2d 408 (C.A. 2d), certiorari denied, 360 U.S. 918. Moreover, objection to the use of the evidence was renewed at the trial and the jury was instructed to find petitioner not guilty if it found that the agents had obtained the records through "fraud, misrepresentation, trickery or deceit." (R. 774.) The instruction was proper. *Smith* v. *United States,* 348 U.S. 147, 150–151.

8. Petitioner's final contention (Pet. 52–53) is that his conviction on Count IV (1954) of the alleged lesser included offense of "failing to supply information" in violation of Section 7203 of the 1954 Code (R. 806) can not stand because of the omission of the word "wilfully" from the written verdict and

from the oral pronouncement of each of the twelve jurors upon being polled. (R. 799–805.)[8] We agree that the conviction on Count IV was erroneous and should be set aside. In our view, the district court erred in giving the following instruction to the jury at petitioner's request (R. 777):

> If you find the defendant wilfully failed to supply information required by law, under the lesser included offense in these two counts in the indictment, but that he did not have the specific intent to evade payment of income taxes, then you may properly find him guilty of the lesser included offense, that is, guilty of the crime of wilfully failing to supply information required by law. * * *

The misdemeanor of wilfully failing to supply information required by law (Section 7203 of the 1954 Code) is not an "offense necessarily included in the offense charged" (Rule 31(c) of the Federal Rules of Criminal Procedure) in the indictment in this case. (R. 10.) The rule has its application, as Judge Magruder has pointed out, "where the legislature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other

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[8] Petitioner might have added that the word "wilfully" was also omitted from the formal judgment. (R. 829.)

The court below did not reach this question, pointing out (Pet. 6a–7a) that the prison sentence on Count IV is "less than, and concurrent with, that imposed on" Count III. There was, however, a $10,000 fine imposed with respect to Count IV, which the district court suspended. (*Supra*, p. 6.)

words, a greater offense including a lesser." *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1st). The theory of the necessarily included offense postulates a gradation in which the greater offense contains some aggravating ingredient not found in the lesser. 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33. See *Berra* v. *United States*, 351 U.S. 131, 134. Plainly, the various crimes of omission proscribed by Section 7203 are not offenses necessarily included in the offense proscribed by Section 7201, *viz.*, the wilful attempt to evade or defeat a tax. *Dillon* v. *United States*, 218 F. 2d 97 (C.A. 8th), certiorari granted, 349 U.S. 914, certiorari dismissed, 350 U.S. 906; *Janko* v. *United States*, 281 F. 2d 156 (C.A. 8th), now pending on petition for certiorari; cf. *Spies* v. *United States*, 317 U.S. 492. There was no failure on petitioner's part to supply information here. What this record shows is a "willful commission", *i.e.*, the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due. Since petitioner has been convicted of a crime which was neither charged in the indictment nor shown by the evidence, it is evident that the conviction as to Count IV must be reversed. The effect of such reversal would be to vacate the $10,000 fine imposed with respect to Count IV, which the district court suspended. (*Supra*, p. 6.)

CONCLUSION

For the reasons stated, the government agrees that petitioner's conviction on Count IV was erroneous and should be reversed. In all other respects, the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 695

ABRAHAM CHAIFETZ, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO MEMORANDUM FOR THE UNITED STATES

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REPLY TO MEMORANDUM FOR THE UNITED STATES

Since the Government confesses error on Count IV and agrees that certiorari should be granted as to that count so that it may be REVERSED (Mem. p. 18-19), petitioner answers the Memorandum filed by respondent and prays that he be permitted to show why this confession of error on Count IV requires a review of Count III, the felony conviction.

The respondent's tactics may be compared to the "sacrifice play" in the game of baseball. Here the government is willing to "sacrifice" an admittedly erroneous conviction on Count IV if it can save and uphold the conviction on

Count III which petitioner contends is also erroneous, and would ruin the life of petitioner, a Member of the Bar, if allowed to stand.

I

THE GOVERNMENT FAILED TO PROVE A NET WORTH CASE

Respondent states (Mem. 7) that the government introduced evidence "to establish annual increases in petitioner's net worth, and that these increases represented current taxable income". The government's starting point omitted cash on hand of $20,000 at the end of 1950, and other assets of $15,172.50 or a total of $35,172.50, which more than accounts for the alleged increase in net worth through December 31, 1953.

Respondent then discusses (Mem. 7, 8) ITS evidence relating to cash on hand, but completely ignores the overwhelming evidence adduced by petitioner, AND BELIEVED AND ACCEPTED BY THE JURY, as evidenced by petitioner's acquittal for 1951, 1952, 1954 (as to the felony of tax evasion), and 1955.

Respondent also discusses some evidence as to the loans receivable by petitioner at the end of 1950. For example, they say "Nothing could be found to substantiate the alleged $3,000. loan to Robert M. Johnson" but they completely ignore the overwhelming evidence produced by petitioner, from live witnesses and documentary exhibits, which established the loans receivable, including the testimony from Adele Johnson, a registered nurse, widow of Robert Johnson, describing the circumstances of the $3,000. loan and how it was repaid, and describing the cash box of petitioner, from which the loan was made. Even more significant is the fact that leads as to all these loans receivable were given to the government during its investigation, including the name and address of Robert Johnson and the others, but that the agents FAILED TO RUN DOWN THESE LEADS. (Record pages cited on page 7 herein)

How the government can recite its repudiated and rejected evidence as supporting the conviction for 1953, is beyond the comprehension of petitioner.

Respondent refers (Mem. 9) to the "alleged cash gift of $9600, received by petitioner from his father in 1953 (to cover the cost of the father's funeral and tombstone and to support his widow), but it must be pointed out that NOWHERE did petitioner describe the funds received from his father as a GIFT. Petitioner treated it as a liability, being a fund held in escrow.

Respondent however persists in describing these funds as a gift.

Govt. Agent Hein testified (R. 354-5) that he was sure appellant had received this money, but claimed it was a gift. Hein also admits that if petitioner got this money, "it would reduce the taxable income for that year" (1953) (R. 355)

Also, petitioner produced witnesses who had personal knowledge of petitioner's receipt of $9600. from his father in 1953 for the purposes indicated, and that petitioner paid the funeral, tombstone and other expenses and supported his mother from the funds. (R. 356)

Notwithstanding his own admissions and the evidence shown, Agent Hein, whose testimony was shown to be biased, unreliable and untrue in many material respects, refused to list this item as a liability for 1953 in computing petitioner's net worth, and treated the $9600. as current taxable income.

However, since the govt's net worth computation (Gov. Ex. #66) claimed an alleged increase in net worth for the three year period ending December 31, 1953, of $33,000. and this computation omitted $20,000. cash on hand over $15,000. in loans receivable, and other assets, the assets erroneously omitted at the opening substantially accounted for the

alleged increase in net worth and it is therefore unnecessary to include the $9600. received from his father, in reversing the conviction for 1953.

Coupling the affirmative proof as to CASH ON HAND AND LOANS RECEIVABLE, which were ACCEPTED and obviously believed by the jury, with the government's failure to run down leads given by petitioner during the investigation as to these additional assets, there was a complete failure of proof to establish a "net worth" tax evasion case *ab initio* or to support a conviction on Count III for 1953, under the net worth theory.

Respondent states (Mem. p. 10) that the agents' investigation "was extensive; that the leads and explanations furnished by petitioner were either false or, if true, would have no substantial relevance to the issue of the amount of unreported income for 1953". The record shows that the agents ADMITTED THEIR FAILURE TO RUN DOWN LEADS FURNISHED BY DEFENDANT, and the "substantial relevance to the issues" is established by the jury's acquittal for 1951, 1952, 1954 and 1955 of the charge of tax evasion. For 1953, petitioner was convicted only because of omitted "specific items".

II

DEFENDANT WAS CONVICTED FOR 1953 (COUNT III) ON A SPECIFIC ITEM BASIS ALTHOUGH COURT HAD RULED THAT DEFENDANT COULD NOT BE CONVICTED ON A SPECIFIC ITEM BASIS. COURT FAILED TO INSTRUCT JURY THAT DEFENDANT COULD NOT BE CONVICTED ON A SPECIFIC ITEM BASIS ONLY

Although 1953 had the most specific items, (20 out of 42 over the five year period), petitioner denied any "wilfulness" in not entering the omitted fees in his fee book, and established that all but $313.30 of the omitted fees were deposited in his check account and identified by name in his check book record which, together with his fee book, constituted petitioner's entire bookkeeping system. Respond-

out states that it introduced evidence of specific items only to show "Willfulness"; petitioner does not complain of the *admission* of this evidence. Petitioner urges that before the issue of wilfulness can arise, the government must first show, in a net worth case, an INCREASE in net worth due to current taxable income. In other words, if no increase in net worth has been established, the issue of wilfulness cannot arise, and a conviction based only on the omitted specific items cannot be upheld.

In this case, although from the beginning the government had described it as a "net worth case" and had justified its failure to furnish petitioner with a list of specific items on the ground that this was not a "specific item" case; and this was so held by Judge Tamm in denying a motion for a bill of particulars (R. 59); and although the trial judge had ruled that the Government was precluded from obtaining a conviction based only on the "specific items"—(R. 293, 296-7, 303), the trial judge who had so ruled at the Bench, out of the hearing of the jury, FAILED TO INSTRUCT THE JURY THAT THEY COULD NOT CONVICT DEFENDANT BASED ONLY ON OMISSION OF SPECIFIC ITEMS unless it was first shown that there was a net worth increase on which tax was due.

This "PLAIN ERROR", consisting of a failure to properly instruct the jury on a crucial point,—made the instructions given "self-contradictory" and could only serve to confuse the jury. Had the jury been told that they could not convict for omission of specific items alone without a net worth increase; had they been instructed that if the government failed to establish a NET WORTH CASE for EACH YEAR, it would have been unnecessary to consider the specific items for any purpose and to acquit defendant; had the jury been told properly, the effect of the agents' failure to run down leads furnished by the defendant, petitioner contends that there would have been no conviction

for 1953. Other errors in instructing the jury (Pet. 31-41) are completely ignored by respondent, which alone require reversal of the conviction.

III

UNREASONABLE RESTRICTION ON NUMBER OF CHARACTER WITNESSES

This assignment of error is brushed off with a statement that, at first, the defense had agreed to 4 character witnesses. The Record shows conclusively that an objection to this ruling was noted and preserved by the defense. (R. 668-671) A right so valuable, in a case based solely on circumstantial evidence, inferred from arithmetical computations, cannot be so lightly tossed aside. A defendant's good character and unblemished reputation is valuable evidence, and where such evidence is unreasonably restricted to defendant's prejudice, as in this case, it warrants reversal.

IV

TRIAL COURT FAILED TO INSTRUCT JURY ON FUNDAMENTAL POINTS

Petitioner's attack on the instructions given by the trial court is discussed in paragraph 5 of the respondent's Memorandum (P. pp. 14-15) and lightly tossed aside with general statements to the effect that petitioner is not entitled to instructions in any particular form; that the charge as a whole must correctly and adequately cover the issues; and that some of the objections were not made at the trial. While it is true that some of the objections were not made at the trial, it is equally true and it is the law, under the plain error rule contained in Rule 52, F.R. Cr. P. that it is the duty of the court to instruct on all essential questions of the law, whether requested or not. *Screws v. U. S.*, 325 U.S. 91.

It was the duty of the Court to instruct the jury that they could not find the defendant guilty of tax evasion based on

omission of specific items. It was the duty of the Court to instruct the jury that if the government failed to establish a net worth case for each year, then they must acquit the defendant for any such year, and not consider any specific items. It was the duty of the Court to instruct the jury of the effect of failure to establish a net worth case, of the failure to run down leads; and to give a proper instruction on the lesser included offenses even though not requested by defendant in the proper form.

Thus, the jury should have been instructed that if the defendant did not commit the felony charged in 1951, 1952 and 1953, but "failed to supply information required by law" in those years, the jury must acquit because those years were barred by limitation.

The Court gave "self contradictory" instructions which while presumably correct as far as they went, nevertheless permitted the jury to convict based on omission of specific items alone, for the year 1953. The charge, read as a whole, does not meet the test and does not adequately and correctly cover these fundamental issues in the case. (See Petition—pp. 33-41)

Although petitioner moved for judgment of acquittal at the close of all the evidence, based on the failure of the agents to run down the leads furnished them, and that the case should never have been submitted to the jury, the trial judge erroneously denied this motion and submitted to the jury the issue of whether the leads had been run down (R. 770-773), although the agents admitted their failure to run down the leads and there was no dispute on this point. (R. 241, 242, 267, 324, 325, 328-330; 332, 334, 335, 336, 337, 338, 340 to 345; 347-349; 354-355; 372-376; 400-401; 692, 723-724)

The Holland rule requires the trial judge to determine, as a matter of law, whether the government has established a net worth case and has run down the leads. Where, as

here, the government has failed in both respects, it is error for the trial judge to submit these issues to the jury as he did here (R-770-773) These crucial errors have been completely ignored or glossed over in respondent's memorandum.

The trial court failed to give any instruction on the lesser included offense for the years 1951, 1952 and 1953. In its Memorandum (P. 16-18) respondent says that the offense of "Failing to supply information" in violation of Section 7203 of the 1954 Code, (or Sect. 145-b-1939 Code) is not an offense "necessarily included in the offense charged", in Section 7201, previously Section 145-a.

Where a defendant is charged with attempting to evade or defeat payment of a tax, in some particular manner, such as here, "by filing a false and fraudulent return", then plainly, the failure to supply information is a lesser offense necessarily included in the greater. This is clearly shown by the detailed and well reasoned opinion in *McCue v. U. S.*, 160 F. Supp. 595, (D. Conn. 1958)

Respondent is compelled to contend that the lesser offense is not an offense included in the greater, because it knows that the lesser offense instruction was NOT GIVEN for 1953. It thus resorts to the sacrifice play, confessing error on Count IV, to try to uphold the erroneous conviction on Count III. Petitioner does not believe the Court will be fooled by this legal mumbo-jumbo.

On page 18 of its Memorandum, respondent cites the *Dillon* and *Janko* cases, (the latter now pending on certiorari), as supporting its statement that the crimes of omission set forth in Section 7203 are not included in the offense contained in Section 7201. THESE CITATIONS DO NOT SO HOLD AND DEAL WITH SECTION 7207 (formerly Sect. 3616-a of the 1939 code) which is not apropos.

In *Janko*, defendant was convicted of tax evasion by claiming allegedly false exemptions for his two minor

children whom he allegedly did not support to the extent of over 50%.

In *Janko* as well as in *Dillon*, there was no evidence to show that the lesser offense contained in Section 7203 had been committed. "Hence, the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies." *Janko* v. *U. S.*, 281 F. 2d 456, at 464

These cases did not involve the "wilful failure to supply information" offense, as was involved in *McCue* or in petitioner's case.

In the instant case, the trial Court held the lesser offense instruction was warranted by the evidence, and he did give this instruction for 1954 and 1955; the only reason he failed to give it for the earlier years, including 1953, was because it was barred by limitations.

Petitioner submits that under these circumstances, it was the duty of the trial court to instruct the jury that if the lesser offense had been committed in 1951, 1952 or 1953, and not the felony, it was their duty to acquit. This instruction was not given; the jury was not told what to do if they found only the lesser offense for 1953; there was no explanation to the jury for the different treatment given to the last two years.

As the *McCue* case points up, whenever a taxpayer files a false and fraudulent return, he fails to supply information; consequently it is a lesser included offense, and the instruction MUST be given whether requested or not. See Footnote 8 in the JANKO case which is not contra to *McCue*—

V

OTHER FUNDAMENTAL ERRORS

In footnote 5 on page 12 of its Memorandum, respondent makes nothing of several fundamental errors committed by the trial Court, describing these contentions as "minor".

In Footnote 5(b) (Mem. 12) respondent states:

> "There is no merit in the argument that Rule 43, F.R. Cr. P. was violated because defendant was not personally present—He waived his rights under Rule 43 by voluntarily absenting himself after the trial had begun".

Petitioner was personally present at every stage of the trial in the Court room; petitioner was not at Bench Conferences or conferences which may have been held in chambers.

The incident here complained of occurred after the case had been submitted to the jury and while they were deliberating. The jury sent a note to the trial judge requesting an exhibit which had been marked "D. No. 60 for identification," but was not in evidence. Without reopening the Court, or sending for defendant, and without defendant's knowledge or consent, the trial judge sent a secret and untrue answer to the jury's request. (Pet. 42)

Petitioner was in the hall, in the Court room, or nearby at all times while the jury was deliberating, and never voluntarily absented himself as claimed by respondent. There is no basis in the Record for such a charge by respondent. There was a clear violation of Rule 43, F.R. Cr. P. by this occurrence, warranting reversal.

See: *McClanahan* v. *U. S.*, 272 F. 2d 663 (CCA-5-1959) (Cases cited in Petition, pages 42-44)

In Footnote 5(c), respondent brushes off another contention described as a "Minor" one: That a deputy marshal

made improper remarks to the jurors during the trial. (Pet. 44-46)

Respondent erroneously states as follows:

> "At the trial, defense counsel thrice told the judge he did not want the alleged incident considered and did not want any action taken thereon. (R. 813, 815, 816)" "The suggestion that the court, sua sponte, should have taken action overlooks the fact that no satisfactory showing of the circumstances surrounding the alleged incident was made."

At the outset, the Record will show, beginning with page 815, that the misconduct of the deputy marshal was NOT brought to the attention of the trial judge "during" the trial as stated by respondent. The trial was concluded on November 24, 1959, when the jury brought in its verdict.

On December 16, 1959, at the argument of the Motion for New Trial etc., then Defense Counsel asked for and received permission to approach the Bench (R. 811). A Beach Conference then ensued out of the hearing of petitioner. Although petitioner ordered a transcript of that hearing, due to the resignation of the Court Reporter several days later, no such transcript was furnished to petitioner until the middle of March, 1960, when he first learned of the statements made by then defense counsel, who had been discharged prior to the time the appeal was noted on February 29, 1960.

The Bench Conference shows that a dispute had arisen between petitioner and his then defense counsel; that petitioner insisted that the misconduct of the marshal be brought to the attention of the trial judge (R. 811-819); that defense counsel wanted additional fees from petitioner before he would inform the court of the marshal's misconduct; that the trial judge did not ask petitioner what he wanted done; that the trial judge "white-washed" this severe charge against the deputy marshal assigned to his court by taking no action whatsoever. (See Pet. 44-46 for further elucidation of this grievous error).

CONCLUSION

Since the Government concedes that certiorari should be granted to reverse the erroneous conviction on Count IV, petitioner begs that the review also encompass the conviction on Count III which is so full of errors that it would be manifest injustice to permit it to stand. The Government's attempt to "footnote" the petitioner into prison by attempting to delude this Court into thinking that the 'footnote' points have no merit should be examined carefully by this tribunal before deciding such important issues. The petition for certiorari should be granted.

Respectfully submitted,

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FILED

Supreme Court of the United States

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 695

ABRAHAM CHAIFETZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR REHEARING

Abraham Chaifetz, the petitioner, a member of the bar of this Court seeks a rehearing of that part of his petition for a writ of certiorari which denied the petition insofar as Count III of the indictment was concerned.

The jury acquitted Petitioner of Counts I, II, and V, and this Court by its order of May 1, 1961 granted certiorari and reversed the conviction on Count IV, thus leaving Count III as the sole remaining count on which Petitioner stands convicted.

The Petition for Rehearing is based on the following grounds:

1. Certiorari should be granted as to the sole remaining count so that the Court of Appeals may pass upon the issues left undecided by this Court's reversal of its judgment on Count IV.

2. The judgment on Count III cannot stand if there is to be uniformity in the application of principles announced by the Supreme Court in "net worth" cases.

3. Important questions in the administration of federal criminal justice presented in this case still remain undecided with conflicts of opinion among the Courts of Appeals and District Courts.

BASIC FACTS

Petitioner was indicted in a five-count indictment charging attempt to evade and defeat payment of income taxes by filing false and fraudulent returns for the years 1951-1955, inclusive. The prosecution was based on the net-worth method of proof, with the Government claiming that specific items of omitted income would be shown solely for the purpose of proving "Wilfulness."

The defense contended that the Government's net worth computation was inaccurate, due primarily to the fact that the revenue agents had omitted some thirty-six thousand dollars in additional assets owned by Petitioner at the starting point,—December 31, 1950.

The defense denied any intentional omission of "specific items" claiming that if *any* item was omitted, it was unintentional and due to negligence, poor bookkeeping system, pressure of work, ill health and emotional upsets due to diabetes, high blood pressure, violent headaches and personal problems,—resulting in memory lapses, blackouts, periods of forgetfulness and fainting spells. (R. 672-674)

The defense established and proved that leads pertaining to all such additional assets as claimed had been furnished to the government by Petitioner, and that no effort had been made by the revenue agents to track down such leads, which, if established, would have established Petitioner's innocence. (R. 241, 242, 267, 324-325, 328-330, 332, 334-338, 340-345, 354-355, 372-376, 400-401, 692, 723-724).

After Petitioner's motion for judgment of acquittal at the close of the Government's case had been over-ruled, the defense offered uncontraverted evidence to establish the existence of the additional assets at the opening or base year. The testimony of the witnesses was supported by documentary records and exhibits corroborating the existence of the additional assets claimed as of the starting point. (R. 831-870).

The prosecution was unable to negate this evidence, and the jury was sufficiently convinced by this evidence and acquitted Petitioner of the felony charged for the years 1951, 1952, 1954 and 1955.

Inconsistently, the jury brought in a verdict of guilty on Count III, for 1953, the *middle* year of the five-year period involved. They also found him guilty of "failing to supply information required by law" on Count IV, the count on which the Government has confessed error, and for which this Court granted Certiorari and reversed the conviction.

The basic dispute between the parties is whether a conviction, for the middle year of a five count indictment prosecuted under the net-worth method,—based as it is with each year depending on the net worth established at the end of the preceding year, and in turn on the opening net worth figure,—can stand under the circumstances of this case.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED AS TO THE SOLE REMAINING COUNT SO THAT THE COURT OF APPEALS MAY PASS ON THE ISSUES LEFT UNDECIDED BY THIS COURT'S REVERSAL OF ITS JUDGMENT ON COUNT IV

Many important questions pertaining to the criminal enforcement of the Internal Revenue Laws were left undecided by the Court of Appeals, which, in its opinion discussed only one of the many substantial errors assigned, namely, whether the requested instruction on the lesser-included offense was properly refused.

That Court held that it was. (288 F. 2d 133)

But what they did not discuss or answer were the following:

1. Whether the Government had established the opening net worth with such reasonable certainty as to warrant submission of the case to the jury;

2. Did the trial court err in ignoring the misconduct of its deputy marshal, who made prejudicial remarks to the jurors and by failing to investigate such misconduct, which was discovered and reported to the trial judge after verdict.

3. Whether the submission of the case to the jury was justified when the undisputed evidence disclosed that the revenue agents failed to track down leads furnished by the petitioner, which, if established, would prove his innocence.

4. Whether the conviction for the middle year in a five year income tax evasion case based on the "net worth" method of proof can stand where defendant has been acquitted for all the other years and when no unwarranted increase in net worth for the third year was proven by the prosecution.

5. Whether the offense of "wilfully failing to supply information" (sec. 145(a), now sec. 7203) was an offense "necessarily included" in the felony of wilfully attempting to evade an income tax by filing a false and fraudulent return. (sec. 145(b), now sec. 7201) of the Internal Revenue Code.

The Court of Appeals stated that it did not reach this question. (Page 6a Petition for Writ of Certiorari) and 288 F. 2d at 136, subhead [4].

6. Did the defendant receive a fair trial by an impartial jury as required by the Sixth Amendment when the trial court permitted, over defendant's objection, *ten* Government employees to sit on the jury, defendant having exhausted all peremptory challenges? In other words, did defendant receive a fair trial where *ten* of the *twelve* jurors were employees of the prosecution presumably biased because they receive their compensation from revenues collected by the Federal Government. (This situation is not in the same category as the ordinary criminal case where there is no reason why a Government employee should be excluded because of his employment).

7. Whether defendant was denied "due process" when the trial judge gave a secret, misleading, confusing and erroneous instruction to the jury in the absence of the defendant without his knowledge, consent or waiver in violation of Rule 43, F.R. Cr. P. and the Vth Amendent.

8. Did the trial judge err in failing to give fundamental instructions on vital issues in the case; i.e.: to acquit if the Government failed to prove a net worth case; that they could not convict on proof of omitted specific items only in the absence of proof of an unwarranted increase in net worth.

The charge of the court as given misled and confused the jury and invited a conviction for 1953 solely because of omitted specific items which were to be used only to show wilfulness, PROVIDED an unwarranted increase in net worth had first been established for the year 1953. (See Petition, P. 34-41 for other errors in charge)

II.

THE JUDGMENT ON COUNT III CANNOT STAND IF THERE IS TO BE UNIFORMITY IN THE APPLICATION OF PRINCIPLES ANNOUNCED BY THE SUPREME COURT IN "NET-WORTH" CASES

Prosecution of federal income tax evasion cases by the net-worth method did not grow up overnight. It was first utilized in prosecuting racketeers for tax evasion in 1931, to prosecute Al Capone, Jake Guzik, and other gangsters. In those cases, net-worth was used to CORROBORATE direct proof of specific unreported income. *Holland* v. *U.S.*, 348 U.S. 121, at 126. In 1943, the Supreme Court approved of its use in the case of *U.S.* v. *Johnson*, 319 U.S. 503, where it was also used to CORROBORATE receipt of unreported income. (*Holland* v. *U. S.*, supra) But since the *Johnson* case, its use has grown "until now it is used in run-of-the-mine cases, regardless of the amount of tax deficiency involved", (*Holland* v. *U. S.*, supra, at 126) and "its use in the ordinary income bracket cases greatly increases the chances for error". (Id.)

This led the Supreme Court, in 1954, to review the serious doubts of lower courts regarding the implications of the "net worth" method of proof, and so this Court granted certiorari in four cases, including Holland, and held up others to abide the result.

Although the Government prevailed in all four companion cases, each tax fraud prosecution represents a conflict between one individual and his government in a context that has a very real meaning to the individual in terms of his liberty and reputation, (not to mention property).

The cost of a trial, the damage to a taxpayer's reputation (especially where he is a professional man) and the traumatic experience of going through the ordeal of a trial, led the Supreme Court to announce certain principles and lay down certain rules for the prosecution of tax-evasion cases by the "net worth" method of proof, as a safeguard for the taxpayer, and to guide both the prosecution and the defense.

Although permitting the Government to use the "net worth" method in enforcing the criminal sanctions of the income tax laws, the Supreme Court pointed out the dangers to INNOCENT persons, and charged all lower courts to closely scrutinize its use.

The basic assumption in the use of the "net-worth" method is that an increase in "net worth" represents unreported taxable income, if such increase, plus non-deductible expenditures and living expenses are greater than the taxable income reported for that year. Added to this danger is, in effect, the shifting of the burden of proof, requiring a taxpayer to explain the "bulge" in his net worth, and the inference of "wilfulness" from proof of net worth increases. Also, while the Government may prove an increase over a period of years, there is the problem of allocating a "net worth" increase to the proper years, or a specific year. Unless an increase subject to the restrictions noted can be allocated to the appropriate tax year, a taxpayer may be convicted on counts of which he is innocent.

In discussing these problems, Mr. Justice Clark said (*Holland* v. *U.S.*, supra, at 129):

> " . . . these pitfalls inherent in the net worth method . . . require the exercise of great care and restraint.
>
> "The complexity of the problem is such that it cannot be met merely by the application of general rules. . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to

utilize, is equally hard for the defendant to refute. *Charges should be especially clear, including, in addition to the formal instructions; a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation".* (Emphasis supplied)

In *Holland*, Mr. Justice Clark, speaking for an unanimous court, said (at p. 132):

> "We agree with petitioners that an *essential condition* in cases of this type is the *establishment*, with reasonable certainty, *OF AN OPENING NET WORTH*, from which to calculate future increases in the taxpayer's assets. *THE IMPORTANCE OF ACCURACY IN THIS* FIGURE IS IMMEDIATELY *APPARENT, AS THE CORRECTNESS OF THE RESULT DEPENDS ENTIRELY UPON THE INCLUSION IN THIS SUM OF ALL ASSETS ON HAND AT THE OUTSET."* (Emphasis supplied)

With reference to the Government's duty to investigate "leads", Mr. Justice Clark said (*Holland*, supra, at 135 et seq.):

> "While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, *ITS FAILURE TO INVESTIGATE LEADS FURNISHED BY THE TAXPAYER MIGHT RESULT IN SERIOUS INJUSTICE.* It is, of course, not for us to prescribe investigative procedures, *BUT IT IS WITHIN THE PROVINCE OF THE COURTS TO PASS UPON THE SUFFICIENCY OF THE EVIDENCE TO CONVICT.* When the Government rests its case solely on the *approximations* and *circumstantial inferences* of a net worth computation, the *cogency of its proof depends upon its effective negation of the reasonable explanations of the taxpayer inconsistent with guilt.*

Such refutation might fail when the Government does *NOT* track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, WOULD ESTABLISH THE TAXPAYER'S INNOCENCE. *When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true AND THE GOVERNMENT'S CASE INSUFFICIENT TO GO TO THE JURY.* This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that ITS DUTY IS NOT TO CONVICT, BUT TO SEE THAT JUSTICE IS DONE". (Emphasis supplied)

" . . . The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads". (Idem, at 139)

The Court agreed with petitioner's contention in *Holland*, that the element of "willfulness" must be proven by independent evidence and cannot be inferred from the mere understatement of income. (Id. 139) In *Friedberg* v. *U.S.*, 348 U.S. 142, the taxpayer contended that the Government had not properly accounted for an alleged hoard of cash on hand at the starting point. In that case, the Government painstakingly traced defendant's finances from 1922 through 1947. (In *Holland*, the Government went back to 1913). In both of these cases, the Government showed that defendants needed and borrowed money, were unable to pay their bills, suffered judgments to be taken against them, and went through hardship and privation, indicating that they had no accumulated funds in prior years. No such history was established in this case.

In *Calderon* v. *U.S.*, 348 U.S. 160, defendant was convicted by the District Court of Arizona; his conviction was reversed by the Ninth Circuit, 207 F. 2d 377, and the Su-

preme Court granted certiorari at the request of the Government and reversed the Court of Appeals, thus re-instating the conviction, with Mr. Justice Douglas dissenting. In *Calderon*, as in *Smith* v. *U.S.*, 348 U.S. 147, the question presented concerned the corroboration of defendant's extra-judicial admissions as to his "opening net worth".

In the *Calderon* case, defendant had stipulated all assets as listed on the government's net worth computation at the starting point, with the exception of the item of "cash on hand". He had stated that he had $500. cash in his pocket and the government listed this as cash on hand at the starting point. He also joined with the agents in working up their net worth computation and showed it to his accountant, after which he signed it. At the trial, however, defendant claimed that he had additional cash on hand in his safe, which was not included. The evidence pro and con created a factual issue which the jury resolved against Calderon. Also, the financial history of Calderon and his business during the prosecution years provided sufficient independent evidence of the crime of tax evasion to corroborate his statements concerning cash on hand. But even if Calderon's testimony of $16,000. or $17,000. additional cash on hand were accepted, by his own testimony there was still a deficiency in reported income of more than $30,000. for the prosecution period.

In *Smith* v. *U.S.*, 348 U.S. 147, Smith was indicted on five counts for the years 1946 through 1950. He was convicted on the first four counts and acquitted on the fifth count, on motion. The evidence tended to show that defendant and wife were of moderate means prior to 1945. In the four succeeding years, they acquired a large amount of visible wealth in bank accounts, real estate, securities, and other assets, and had understated their income for the four-year period by over $190,000. Smith delivered to the agents a five-page document which included tables on his securities, prior tax returns, living expenses, and a list of assets for each year from 1945 through 1949 showing changes in his

net worth over the prosecution period. These were all signed by him, and certified as "my true net worth". This statement was accompanied by a check from Smith covering the amount of tax he thought he owed.

Smith objected to admission of this net worth statement, claiming the agent had tricked him by promising him that the case would be closed out on that basis. The agent denied any such agreement or promise to close the case. The motion to suppress was denied, and the admissibility thereof submitted to the jury under proper instructions. The question presented in *Smith* was whether there was sufficient independent evidence to corroborate his extrajudicial admission that he did not have sufficient assets at the starting point TO ACCOUNT FOR THE INCREASES IN NET WORTH ATTRIBUTED TO HIM IN THE PROSECUTION YEARS. (Emphasis supplied). The Court held that corroboration of alleged admissions was required, "where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element VITAL to the Government's case.

Mr. Justice Clark, again speaking for a unanimous Court, said (348 U.S. at 155):

> "WITHOUT PROOF THAT ASSETS ON HAND AT THE BEGINNING OF THE PROSECUTION PERIOD DID NOT ACCOUNT FOR THE ALLEGED NET WORTH INCREASES, THE GOVERNMENT COULD NOT SUCCEED." (Citing *Holland* v. *U. S.*, 348 U.S. 121) (Emphasis supplied)

NO SUCH PROOF WAS PRODUCED IN THE *Chaifetz* CASE.

Affirming the conviction in *Smith*, the Supreme Court said that the trial judge and the reviewing courts had a duty of "careful scrutiny".

With these considerations and principles announced by the Supreme Court in the so-called "net-worth" cases, we turn to the facts in the *Chaifetz* case.

In the instant case, the evidence adduced by the Government is INSUFFICIENT TO SUSTAIN A CONVICTION ON COUNT III. This assignment of error seems to have become lost in the great mass of papers constituting the Record, and due to the complexity of the case, the Court of Appeals did not discuss or even mention this point, and this contention remains unanswered even now.

It would be a gross miscarriage of justice to permit petitioner, a reputable attorney and member of this Bar, to remain ensnared in one count out of a five-count indictment, because of the dangers to an accused in the net worth method.

The five-count indictment here covered the period from January 1, 1951 through December 31, 1955. The net worth computation made by the Government Agents was predicated upon the "opening net worth" figure, which they used as a starting point to calculate future increases at the end of each year involved.

Obviously, if the agents have omitted from their computation substantial assets owned by petitioner at the starting point, sufficient to account for the alleged increase in net worth, all subsequent calculations are inaccurate and erroneous to that extent; or, putting it as Mr. Justice Clark said it in *Smith v. U.S.*, 348 U.S. 147, at 155:

> "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed".

The Government's proof in this case consisted of evidence to establish "opening assets" which were not stipulated; and several items of omitted income, referred to as "specific items" which were offered for the sole purpose of showing "wilfulness". The evidence showed that all but $313.30 was entered, deposited, and identified in petitioner's check book stub records for the year 1953.

This relationship between the alleged increases in net worth and "specific items" must constantly be kept in mind, as this goes to the heart of the question of sufficiency of the evidence for 1953 (Count III).

Construing the evidence most favorably to the Government, its net worth computation (R. 884-Govt. Ex. No. 66) showed that petitioner had a net worth on December 31, 1953 of $94,114.20 and an opening net worth on December 31, 1950, of $61,018.52. The Government contended, based on these figures, that petitioner's net worth had increased $33,095.68 by the end of 1953. Everything depends on the accuracy of the Government's "opening net worth figure".

The prosecution proved, and defendant admitted, that he owned all the assets listed in the government's "opening net worth". But the defendant previously furnished the Government during the investigation, with leads to additional assets of $35,172.50 owned as of the starting point, which were omitted from the government's starting net worth, and which would more than account for the apparent net worth increase at the end of the 3 year period to December 31, 1953, and at the trial established the existence of these additional assets as of December 31, 1950 (See R. 850-Def's Ex. No. 45), both by documentary evidence and exhibits (R. 831 to 870) and by testimony of persons who either were indebted to petitioner at that time or had other personal knowledge of the facts. None of this evidence was contradicted by the prosecution, nor was it able to shake the defense witnesses on cross examination. Cross examination of the Revenue agents revealed that they had completely ignored the leads furnished to the Government, and failed to track them down as required by the rules laid down in the Holland case. (R. 241-242; 267; 324-325; 328-330; 332; 334-338; 340-345; 347-349; 354-355; 372-376; 400-401; 692; 723-724).

There was no evidence in this case of a financial history going back for years, as in the "net-worth cases", to show

that petitioner was ever "broke" or without ample funds. There were no judgments against petitioner. His home was bought and paid for in full in the early 1940's. In fact, petitioner established by the expert testimony of Mr. Wayne Kendrick, CPA and formerly Chairman of the D. C. Board of Accountancy for 27 years, that he was worth more at the end of 1945, FIVE YEARS BEFORE THE STARTING POINT, than the government showed as its opening at the end of 1950.

Except for the item of cash on hand, the CPA was able to *certify* each asset as being owned by petitioner at end of 1945. (Def. Ex. No. 53-R, 864-868)

This total failure to prove its "opening net worth" figure resulted in an acquittal by the jury of the felony charged for 1951, 1952, 1954 and 1955. For 1953, the jury was instructed that it could return only TWO possible verdicts: guilty of the felony or "not guilty". The jury brought in a verdict of "Guilty" for 1953, Count III.

As has been shown, the prosecution completely failed to carry its burden of showing that there was ANY net worth increase through 1953, and the jury resolved this issue in favor of the defendant, by its acquittal for 1951 and 1952. Any increase for 1953 had to be based on the ORIGINAL STARTING NET WORTH. Since all reasonable men would have to agree that the Government failed to prove that defendant did not have the additional assets at the starting point, and this would explain the apparent net worth increase at least through 1953, the trial court should have granted the motion for judgment of acquittal and should not even have submitted the first three Counts to the jury on that basis, as well as the failure to run down leads.

After verdict, when defendant renewed his motion for judgment of acquittal, the trial court was in a better position to scrutinize the evidence insofar as it related to the

conviction on Count III, for 1953, the only felony count remaining.

We contend that the error in submitting the case to the jury for 1953 was compounded when the trial court failed to grant the motion for judgment of acquittal N.O.V.

The District Court did not heed the salutary rules announced by the Supreme Court in the net-worth cases, supra, for the guidance of the prosecution, the defense and the trial court.

It refused to grant defendant's motion for judgment of acquittal when the undisputed evidence disclosed the failure of the Government agents to track down relevant leads furnished by the defendant as to additional assets owned at the starting point.

It failed to give a charge that was "especially clear" and failed to state the inferences available for the accused; failed to show the relationship between the alleged net worth increases and the specific items; failed to limit the specific items to show "wilfulness", as he had previously ruled; (R. 296) and committed other errors of omission and commission as shown in detail in the Petition for Writ of Certiorari.

The Court of Appeals did not review the case as charged by this Court, "bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation". That Court ignored the complete insufficiency of the evidence to sustain a conviction on Count III by the net worth method, and embarked on a seven-page discussion of the "lesser included offense" assignment of error, and even decided that question erroneously and in conflict with a case in its own Court cited as authority for its decision, when that case, as will be shown, is authority for *Petitioner's* contention.

The Government's failure to investigate the relevant leads furnished by petitioner or to negate his explanations, coupled with affirmative proof by the defense, not negated, as to the correct opening net worth etc., required the trial court to "consider them as true and the Government's case insufficient to go to the jury". In addition, the Government failed to prove any tax deficiency for 1953, except the computation of the agent, based on his own computations of increases in net worth, based on his erroneous assumptions and conclusions as to the "opening net worth". This is one of the dangers when courts permit a series of theoretical estimates and computations as to a taxpayer's income to take the place of proof. IT SUBSTITUTES INFERENCE FOR PROOF. ["The 'Net Worth' Decisions: Proof of Tax Evasion by Inference" by Harry Graham Balter—ABA Journal, June 1955.]

The uncontradicted evidence showed that the tax return for 1953 was made on January 19, 1954. Uncontroverted medical testimony showed that in 1953 petitioner developed diabetes and that from 1953 to 1954 the diabetes was uncontrolled with attendant symptoms; that he suffered from severe migrain headaches, high blood pressure, lapses of memory and black-out spells caused by the diabetes. Other testimony showed that defendant's father, Louis Chaifetz, died on December 30, 1953, was buried on December 31, 1953, and when petitioner returned from the funeral, he contracted pneumonia and was ill and disabled, and drew disability benefits from January 1, 1954 through March 15, 1954—all of which negated any willful attempt to defraud by filing the return prepared during this period. (R. 672-674)

The prosecution described the case at all times and during the trial, as a "net-worth case" (R. 293, 296) and it was tried on that basis. The Court, in instructing the jury said:

> "The Government, in this case, relies upon the net-worth-plus expenditures method of proof to substan-

tiate its contention that the defendant wilfully attempted to evade payment of income taxes. *To Corroborate* its claim that the defendant was *wilful* in attempting to evade payment of income taxes, the Government has submitted evidence of alleged specific items. On the other hand, defendant denies that he wilfully omitted any specific items of income for any of the years in issue and asserts that what omitted items there were were omitted by reason of mistake or inadvertence". (R. 763)

Thus, the specific items alone could not be the basis of a conviction for 1953 (or any year), since this was NOT a "specific item" case, with the specific items to be used solely to show wilfulness (R. 293, 296-297, 303), PROVIDED the prosecution was First able to prove or the jury would FIRST find an increase in net worth for 1953 (or any year), since specific items do not enter into the computation in a net worth case.

Although the trial court had ruled that the prosecution had *precluded itself* from finding defendant guilty on a "specific item" basis (R. 296-297), the trial court FAILED to give this vital instruction to the jury, and did NOT tell them that they could not find petitioner guilty for 1953 (or any other year) based on specific items alone and that before they could consider the specific items on the question of intent or wilfulness, they first had to find beyond a reasonable doubt that there was an unwarranted increase in net worth for 1953 (or any year).

Instead, the charge, as given, invited a conviction based on specific items alone. (R. 756-758.) By instructing in this manner, omitting inferences favorable to defendant, the jury was told they could find petitioner guilty on specific items alone, since they could infer that if any specific item was not reported, an additional tax, of necessity, was due thereon.

If we examine the prosecutor's argument, hammering and pounding over and over at the specific items omitted

in 1953 (R. 741-742) there is no other explanation for the conviction for 1953. The jury was told, erroneously, that conviction would be warranted if they found that defendant did not *fully and correctly* report his income and the tax due thereon for any year that the returns were filed in a wilful and intentional attempt to evade payment of income tax. (R. 758-759). This type of instruction too, coupled with failure to instruct that conviction could not be based on specific items alone, invited conviction on a specific item basis.

Petitioner asks this Supreme Court merely to read the entire charge as given by the trial court (R. 747-778) and the conclusion is inescapable that this was not a fair charge to the petitioner or a charge required in a net worth case as outlined by this Court.

Petitioner asks only that he be given equal justice and the equal protection of the law.

This Court has not spoken on this subject since 1954 and has consistently denied certiorari in "net worth" cases. But this case cries out for the Supreme Court to exercise its supervisory power to afford petitioner the safeguards announced in the Holland case as a protection against overzealous prosecution of tax evasion cases by the net worth method, where inferences are substituted for proof.

III.

IMPORTANT QUESTIONS IN THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE PRESENTED BY THIS CASE STILL REMAIN UNDECIDED, WITH CONFLICTS OF OPINION AMONG THE COURTS OF APPEALS AND DISTRICT COURTS

This Court has always granted certiorari whenever serious questions in the administration of federal criminal justice have been presented. *McNabb* v. *U. S.*, 318 U.S. 332, 63 S. Ct. 608; *Braverman* v. *U. S.*, 317 U.S. 49, 63 S. Ct. 99; *U. S.* v. *Johnson*, 319 U.S. 503, 63 S. Ct. 1233; *Spies* v. *U. S.*, 317 U.S. 492, 63 S. Ct. 364, 87 L. ed. ——;

Holland v. *U. S.*, 348 U.S. 121, 75 S. Ct. 127, 99 L. ed. 150; and this Court has not hesitated to correct its own prior judgments and has exercised this power even after timely petitions for rehearing were denied, by vacating the previous orders, granting the petition for rehearing, and reversing the judgment. *U. S.* v. *Ohio Power Co.*, 353 U.S. 98; 77 S. Ct. 652; *Cahill* v. *N.Y., N.H. & H.R. Co.*, 351 U.S. 183; 76 S. Ct. 758; 100 L. ed. 1075; *Achilli* v. *U. S.*, 352 U.S. 1023; 77 S. Ct. 588; 353 U.S. 374; 77 S. Ct. 995; *Remmer* v. *U. S.*, 347 U.S. 227, 74 St. Ct. 450; 98 L. ed. 654; 348 U.S. 904; 75 S. Ct. 288; 99 L. ed. 654; 350 U.S. 377; 76 S. Ct. 425; 350 U.S. 820, 76 S. Ct. 63.

The *Remmer case* is apropos to one of the important questions presented in the instant case and likewise was a tax evasion case. During the trial, one of the jurors was approached by an outsider and told he could make some easy money if he made a deal with Remmer. The juror reported this to the judge, who in turn reported it to the prosecutor, who with the judge's approval called in the F.B.I.—all of which was unknown to Remmer until he read about it in the newspaper AFTER the jury had returned its verdict of guilty.

Three times this Court granted certiorari because of this one incident. The first time the case was remanded to the District Court to hold a hearing to determine whether the incident was prejudicial to Remmer. The District Court held a hearing and found no prejudice to him. Thereafter the Supreme Court remanded the entire record to the 9th Circuit to consider the whole case in the light of the then recent net worth decisions. The 9th Circuit reviewed the whole record and affirmed Remmer's conviction. The case was brought to this Court on certiorari a third time, limited to the question of the effect of the extraneous communications with the juror upon Remmer's right to a fair trial.

The Supreme Court, which had previously held that ANY contact or private communication with a juror is presumptively prejudicial, HELD that the evidence established that the incident had affected the juror's freedom of action as a juror and VACATED the judgment of conviction and remanded with directions to grant a new trial. The Supreme Court said:

> "Both equal protection and due process emphasize the central aim of the judicial system that all people charged with crime must stand on an equality before the bar of justice". (citing-Griffin v. State of Illinois, 351 U.S. 12, 76 S. Ct. 585; 100 L. ed.——.

In the instant case, AFTER the jury had returned its verdict, an alternate juror telephoned petitioner's former counsel and reported several prejudicial remarks made by the deputy marshal to the jurors during the trial. When petitioner learned of this, he compelled former defense counsel to report the matter to the trial judge and to demand a new trial based on that incident.

What occurred appears in the Record, at pp. 811-819, and took place at a Bench Conference between former defense counsel and the trial court, out of petitioner's hearing. It appears that in addition to the prejudicial jury incidents, former defense counsel abdicated so that petitioner was deprived of effective assistance of counsel without his knowledge.

Although petitioner had ordered a transcript of this bench conference on December 16, 1959, the day it transpired, he was unable to obtain a copy thereof or learn what was said until March 16, 1960, as the Court Reporter who reported the conference, had resigned and gone to Texas.

Petitioner was not only deprived of a fair trial by an impartial jury, as required by the Constitution, but due

to an unwarranted demand for money by former defense counsel, not acceded to by petitioner, that counsel did not press the jury matter. But as this Court said in the *Remmer case*, the trial court had an independent duty to investigate the occurrence to determine whether there had been prejudice to petitioner. THIS THE TRIAL COURT FAILED TO DO. Petitioner was not consulted as to his wishes in the matter.

The Court of Appeals did not discuss or decide this important question, and petitioner prays that the "Remmer Rule" be applied in this case so that he may receive equal justice and equal protection of the law, and that there may be uniformity in the application of principles announced by the Supreme Court.

In the exercise of its supervisory powers, the Supreme Court should not let the conviction on Count III herein stand.

This Court has held that if an error in a criminal case had a substantial influence on the result, or if there is grave doubt about it, THE CONVICTION CANNOT STAND, even if it is supported by evidence. *Eiswick* v. *U. S.*, 329 U.S. 211, 67 S. Ct. 224; 91 L. ed. 196.

But many other grave errors occurred in petitioner's case. Over petitioner's objection, 10 employees of the Federal Government, who receive their compensation from the revenues collected, were permitted to sit on the jury after petitioner had exhausted his peremptory challenges, depriving petitioner of a fair trial.

Although the Supreme Court has considered a similar question previously (Cases cited in Pet. pp. 28-31) it is submitted no previously considered cases involved tax evasion, and that this Court should reconsider the question in the light of the type of violation involved; the great

number of Government employees who sit on juries in the District of Columbia; and whether a government employee is impliedly biased as a matter of law in a criminal case where his employer, the Government, is prosecuting a defendant for income tax evasion.

Were the Supreme Court to rule in favor of petitioner on this question, it would not preclude government employees from sitting on juries in other types of criminal cases where the revenue was not involved.

This question too was not discussed or decided by the Court of Appeals.

Another and perhaps the most grievous error in this case was the failure of the trial court and the reviewing court to apply the principles and rules announced by this Court in *Holland* v. *U. S.* for the guidance of lower courts in handling tax evasion cases prosecuted under the net worth method. It has already been shown that there was a complete absence of proof by the Government to establish its "opening net worth" and a complete failure to run down leads to some $36,000 in additional assets owned at the starting point, which were affirmatively proved by petitioner, and failure to give a fusid charge to the jury, with a refusal to instruct on vital points which would have resulted in an acquittal. But this primary issue was likewise not discussed nor decided by the appellate court, charged with the duty of carefully scrutinzing each case on its own facts.

Tied in with the insufficiency of the evidence to establish a "net worth" case, is the failure of the trial court to grant judgment of acquittal; particularly on the motion N.O.V., when only 1953 and the erroneous 1954 misdemeanor conviction were left for examination and consideration.

The failure to grant the motion at that point was inexcusable error.

The trial court erred in submitting the case to the jury; but, when, in submitting the case, it refused to give the "lesser included offense" instruction as requested by petitioner for 1953 as well as 1954 and 1955, as provided by Rule 31(c), F.R.Cr.P.; failed to instruct the jury to acquit if the additional assets owned by defendant at the starting point account for the alleged increase in net worth; failed to tell the jury that guilt had to be determined on a "net worth" basis only, since this was strictly a net-worth case, and that it could not convict based on omission of unreported specific items if no unwarranted increase in net worth was established beyond a reasoanble doubt by the Government; gave erroneous instructions permitting a conviction on a specific item basis as shown hereinabove; failed to point out inferences FAVORABLE to the petitioner, such as the fact that there was no proof indicating that ANY tax was due for 1953 or any other year, except the computation of the Revenue Agent based on his assumption that his opening net worth was correct; that if it was not correct, there was no proof of any tax deficiency; —when the trial court did and failed to do all these things, this was the fatal error, which compounding all the other errors, resulted in an unjust conviction for 1953.

But the appellate court did not see fit to discuss any of these instructions or lack of instructions or decide the contentions based thereon.

Still another reversible error was committed when the trial court violated Rule 43, F.R.Cr.P. and denied petitioner "due process" under the Fifth Amendment to the Constitution, when he gave an erroneous and secret instruction to the jury in the absence of the petitioner, without the latter's knowledge, consent or waiver.

After the jury retired to deliberate, it sent a note (R: 797) to the trial judge requesting a certain exhibit described as the "Philadelphia Conference Letter" (Def's Exh. No. 60 for ident.).

The Judge did not re-open the Court and call in either the Jury, the defendant or counsel for either side, for the purpose of giving the instruction to the Jury in the PRESENCE of defendant.

Instead the trial judge wrote the following on a slip of paper and sent the paper to the jury (R. 797):

> "November 24, 1959. Received message 1:30 P.M.: after consultation with *counsel*, jury was informed that *no such exhibit existed*.
>
> /s/ Luther W. Youngdahl"

Later the jury brought in a verdict of guilty for 1953.

Defendant and his counsel did not know of the Jury's request for the instruction or the action by the Court until AFTER the verdict, and the discharge of the Jury. This was discovered later when defendant and present counsel found the note in the case file. Not only does Rule 43, F.R.Cr.P. require that the defendant be present at "every stage of the trial", but that rule continued existing law. *Lewis* v. *U.S.*, 146 U.S. 370; *Diaz* v. *U.S.*, 223 U.S. 442, 445; Notes of Advisory Comm. on Rule 43.

In *Shields* v. *U.S.*, 273 U.S. 583, 47 S.Ct. 478, the Supreme Court held:

> "Joint request by counsel for defendant and prosecutor to hold jury until agreeing on verdict, made in judge's chambers without presence of defendant, cannot be extended beyond its exact terms, AND DID NOT INCLUDE AGREEMENT FOR COURT TO RECEIVE COMMUNICATION FROM JURY AND ANSWER IT IN DEFENDANT'S ABSENCE, . . . ".

In *McClanahan* v. *U.S.*, 272 F. 2d 663 (1959), the Fifth Circuit REVERSED a conviction for tax evasion solely on this ground without reaching other errors assigned. This result is in line with the decisions of the Supreme Court and other Federal Courts. *Parfet* v. *Kansas City Life Ins.*

Co. (C.A. 10), 128 F. 2d 361; *Fillippon* v. *Albion Slate Co.*, 250 U.S. 76, and cases cited therein.

But this important and serious question which can arise in any federal criminal case was not discussed or decided by the reviewing court below, and by its affirmance, brought it in conflict with decisions of this Court and the Fifth and Tenth Circuits, supra.

Such apparent error should not be condoned by the Supreme Court.

Last but not least is the matter of Rule 31(c), F.R.Cr.P., the "lesser included offense", and whether any of the misdemeanors enumerated in Section 145(a) (now Section 7203 I.R.C.) is a "lesser included offense" contained in Section 145(b) (now Section 7201 I.R.C.).

Specifically, is the misdemeanor of "willfully failing to supply information" included in the felony of attempting to evade payment of income tax by filing a false and fraudulent return?

This is a very important federal question which constantly arises in enforcement of the criminal sanctions of the Internal Revenue Code. It is a question concerning which there is conflict in the lower Federal Courts and it does not appear to have been decided by the Supreme Court, except perhaps by implication, in *Spies* v. *U.S.*, 317 U.S. 492; 63 S.Ct. 364; 87 L.ed. —, where Mr. Justice Jackson, delivering the unanimous opinion of the Court, REVERSED a conviction under Section 145(b) because the trial court refused to give an instruction that an inference of a willful attempt to defeat or evade tax must come from some proof in the case OTHER than that necessary to make out the misdemeanors enumerated in Section 145(a). In *Spies*, we find the following statements by the Supreme Court:

> "WILFUL BUT PASSIVE NEGLECT of the statutory duty may constitute the lesser offense. . . ."

"A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it CLEAR THAT THIS FELONY (145-b) MAY INCLUDE ONE OR SEVERAL OF THE OTHER OFFENSES AGAINST THE REVENUE LAWS."

The specific misdemeanor of failing to supply information was not discussed in the *Spies* case. The only case petitioner has been able to find SQUARELY IN POINT is the case of *U.S.* v. *McCue*, 160 F. Supp. 595 (D.C. Conn. 1958) where Judge Anderson analyzed the offense of "willful failure to supply information" leaving no room to doubt that "it is necessarily included in the felony of attempting to evade tax by filing a false and fraudulent return, since it is impossible to file a false and fraudulent return without failing to supply information."

The Trial Judge below followed *McCue* and gave the instruction for 1954 and 1955 but refused to give it for 1953 (Count III), and the earlier years, stating that he did so because they were barred by limitations. The Court of Appeals below, in the only point discussed and decided, held it was not error to refuse to give the instruction but did not reach the question whether it was a lesser included offense. In making that decision, the appellate court relied on its own decision in *Askins* v. *U.S.*, 102 U.S. App. D.C. 198; 251 F. 2d 909, stating that its holding in *Chaifetz* was in accordance with the holding there.

THAT IS NOT SO.

THE ASKINS CASE IS DIRECTLY CONTRARY TO THEIR HOLDING IN THIS CASE AND SUPPORTS PETITIONER'S CONTENTION.

The Court of Appeals misconceived the issue, which is not whether Chaifetz could be CONVICTED OR PUNISHED for a 1953 misdemeanor which was barred by limitations, but whether the jury should have been instructed

on the lesser included offense so that they jury could determine the grade or degree of crime, if any, which petitioner had committed for the year 1953.

The question presented on the lesser included offense is:

Should the instruction on the lesser included offense be given where *punishment* is barred by limitations?

In *Askins*, defendant was indicted for first degree murder and was convicted of murder in the second degree, a lesser offense, which was barred by limitations. Defendant failed to object to sentence, and did not raise the question on appeal and his conviction was affirmed. (97 U.S. App. D.C. 407; 231 F. 2d 741, cert. den. 351 U.S. 989).

Later Askins brought a proceeding under 28 U.S.C.A. 2255 and attacked the sentence and conviction for the first time. The Court below reversed the conviction and speaking through J. Fahy said:

> "A sentence imposed for second degree murder on an indictment for first degree murder, but found more than three years after the offense, is a sentence not authorized by law—. Appellant could not have objected to being tried on the indictment since it was for first degree murder, as to which there is no time limitation. When, however, the verdict of guilty of second degree murder was rendered, he could have objected to being sentenced, and indeed, he could have requested that ONLY the issue of first degree murder be submitted to the jury. *But he lost no right by not doing the latter.* He was not required to ask for a verdict of either first degree murder or not guilty: *HE COULD SEEK A VERDICT OF EITHER SECOND DEGREE MURDER* OR OF NOT GUILTY, and his failure to object to being sentenced did not relieve the court of its own obligation to impose no sentence not authorized by the law applicable to the verdict which was rendered—" **"The question of sentence—punishment—was one for the court".** (Emphasis supplied)

Judge Prettyman, who wrote the opinion in petitioner's case, was a member of the panel which decided the *Askins* case in 1958, and when he wrote in Chaifetz:

> "We had this problem in Askins v. United States, and our present holding is in accord with that one"

he was mistaken.

As has been shown, the present holding of the Court of Appeals is *CONTRARY* to the holding in Askins. But the holding below on this point is also CONTRARY to the decision of the Supreme Court in *Stevenson* v. *U.S.*, 162 U.S. 313, 16 S. Ct. 839; 40 L. ed. 980. There defendant was charged with murder and pleaded "self-defense". The trial court there ruled the crime was either murder or done in self defense and that under no view of the evidence could the jury find defendant guilty of manslaughter, and refused to instruct on the lesser included offense.

The Supreme Court reversed the conviction of murder and remanded the cause for a new trial. Upon review, it held that there was evidence which tended to bring the crime within the grade of manslaughter, and that it was then a proper question for the JURY whether the crime was manslaughter instead of murder—and it was error to refuse an instruction on this subject. The Supreme Court said:

> **"The evidence as to the lesser included offense need not be uncontradicted or in any way conclusive on the question. So long as there is some evidence, the proper weight to be given it is for the jury to determine."**
> **"We only decide that the question as to the grade of the crime,** whether murder or manslaughter, **should have been submitted to the jury** as well as the question of self-defense". (Emphasis supplied)

Petitioner makes the same contention; that the question as to the grade of the crime, if any, committed in 1953, whether the felony of income tax evasion, or the misdemeanor of

"willfully failing to supply information required by law", should have been submitted to the jury. At the very least the jury should have been told to acquit if only the "Lesser Offense" was committed for 1953. The jury attempted to find petitioner guilty of this misdemeanor for 1954 (Count IV) but were precluded from doing so for 1953 (Count III), because the trial court restricted them to a verdict of either guilty of felony or not guilty.

It is no answer, as the trial judge said, 181 F. Supp. 57, (R. 822)

> "But if the jury believed the defendant 'only committed a misdemeanor' it would have found the defendant not guilty of the felony charge for 1953. This it did not do. —"

In the *Stevenson* case, 162 U.S. 313, the jury found defendant guilty of murder. It was held error not to instruct on the lesser offense of manslaughter. To say, as Judge Youngdahl said, that if the jury believed the defendant only committed manslaughter, it would have found him not guilty of murder, only begs the question.

The Jury did find Stevenson guilty of murder. THE ERROR LIES IN FAILING TO GIVE THE PROPER INSTRUCTION; TO GIVE THE JURY THE OPPORTUNITY TO DECIDE THE FACTUAL ISSUE AS TO THE GRADE OR DEGREE OF CRIME WHICH MAY HAVE BEEN COMMITTED.

It is fundamental law that a statute of limitations is not pleaded in advance and the question ought only be raised when evidence of a lesser offense barred by the statute is allowed for the purpose of sentencing for the misdemeanor or lesser offense.

In the instant case, the lower courts either chose to ignore or refused to consider the important question raised by Petitioner who insists that it is good law to instruct a

jury on all points of the law involved if the evidence produced at the trial warrants an instruction on the lesser-included offense since a conviction or acquittal for the offense alleged in an indictment is a bar to prosecution for a lesser offense upon which the defendant could have been convicted as a part or incident of the crime charged, *Ex Parte Nielsen*, (1889), 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118, the court must consider whether the evidence justifies a verdict of guilty not only as to the crime charged, but also as to lesser offenses that may be included in the crime. *U. S. v. Kelly*, 119 F. Supp. 217, U.S.D.C.D.C. (Laws, C. J.)

All of the foregoing cases hold that a defendant is entitled to a lesser offense charge as a matter of right.

Since the only question decided by the Court of Appeals was decided erroneously and in conflict with its own decision and that of the Supreme Court, this error should not pass unnoticed to the detriment of petitioner, but the Supreme Court should grant this petition for rehearing, grant certiorari and reverse the conviction on Count III.

Finally, petitioner, seriously questions whether he was truly afforded a trial by jury—when part of its function—to determine what the defendant was guilty of, based on the facts presented—was taken away and decided in advance for them by the court.

CONCLUSION

Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence, which are not satisfied by mere observance of minimal historic safeguards.

The principles announced by this Court in the "net-worth"-cases were designed not only to secure convictions of the guilty but also to safeguard and protect the innocent. A conviction resting on such a flagrant disregard of the rules announced by this Court cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.

Simple fairness and the democratic principles upon which this country is founded, demand and require that the petitioner be afforded the equal protection of the law, equal justice under law and due process of law. Simply stated, this means that his net worth case be tried under the same rules laid down in the Holland case; that the jury incident in his case be considered in the light of the Remmer case, and that in view of all the other foregoing prejudicial and reversible errors, the conviction ought to be reversed

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the Order denying the petition for writ of certiorari as to Count III be vacated and that certiorari be granted as prayed in the Petition and the conviction on Count III be also reversed.

Respectfully submitted,

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Certificate of Counsel

The undersigned, I. William Stempil, attorney for petitioner herein, hereby certifies that the Petition for Rehearing herein is presented in good faith and not for delay, and that in his judgment said petition is restricted to grounds permitted by Rule 58 of this Court.

I. WILLIAM STEMPIL
Attorney for Petitioner

Dated: May 24th, 1961.